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No. 2580

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. W. RAPPLE,

Petitioner and Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt,

Respondent and Appellee.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Northern District of California, First Division.

AND

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed
MAY 21 1915
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F. Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by ... omission seems enclosed within

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

Bankrupt.

Petition to Revise in Matter of Law.

To the Honorable Judges of the Circuit Court of Appeals of the United States for the Ninth Circuit:

The petition of J. W. Rapple respectfully shows: That by order of the District Court of the United States for the Northern District of California the Lennig Engineering Company, a corporation, was adjudicated a bankrupt and Harry A. Dutton was and is duly elected, appointed, qualified and acting Trustee of the estate of said bankrupt. On the 30th day of October, 1912, the United States Fidelity & Guaranty Company of Baltimore, Maryland, had in its hands the sum of $783.44 to which your petitioner and said Trustee both made claim. Thereafter on the 4th day of September, 1913, said Trustee procured the Referee in bankruptcy in the above-entitled cause to make an order directing said United States Fidelity & Guaranty Company of Baltimore, Maryland, to pay said sum to said Trustee without prejudice to the claim of your petitioner thereto. Thereafter your petitioner filed with said Referee a petition praying that said Referee make an order directing said Trustee to pay said sum, or the balance thereof remaining in the hands of said Trustee, to your petitioner or to Asbestos Manufacturing &

Supply Company, a corporation, for certain purposes in said petition specified, and said petition was heard upon an agreed statement of facts. Thereafter on the 28th day of May, 1914, an order was made and entered in the said proceeding by said Referee whereby said petition was denied. Thereafter on *on* the 5th day of June, 1914, your petitioner filed his petition for review of said order, which petition came on for hearing before said District Court, and thereafter on the 3d day of October, 1914, by order of said District Court the order of said Referee was affirmed.

That the statement of facts above referred to shows that said fund in the hands of said Trustee was the asset or earning or increment of an asset which formerly belonged to Lennig-Rapple Engineering Company, a copartnership, of which your petitioner was the retiring partner and one E. B. Lennig was the continuing partner after dissolution thereof; that at the time of said dissolution said Lennig agreed to pay the debts of said copartnership and received an assignment of said Rapple's interest in the assets thereof; that said Lennig thereafter assigned said asset from which said fund was produced to the bankrupt herein, which took the same with notice of all the facts; that said Lennig failed to pay the debts of said copartnership, and that a judgment had been recovered against said copartnership by said Asbestos Manufacturing & Supply Company in the sum of $999.78 upon a debt owing by said copartnership; that said debt and said judgment were unpaid. The question of law presented by said petition was whether, under said facts,

the fund in the hands of said Trustee was subject to the lien or equity of your petitioner to have the same used to pay said Asbestos Manufacturing & Supply Company. Your petitioner contends that said order of said District Court was erroneous in matter of law in that said Court did not so decide, but, on the contrary, denied said petition.

WHEREFORE, your petitioner, feeling aggrieved because of such order, asks that the same be revised in matter of law by your Honorable Court as provided in Sec. 24b of the Bankruptcy Law of 1898 and the rules and practice in such case provided.

J. W. RAPPLE,
Petitioner.

DAVID L. LEVY,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Attorneys for *Attorney.*

State of California,
City and County of San Francisco,—ss.

J. W. Rapple, being first duly sworn, deposes and says: That he is the petitioner mentioned in the foregoing petition; that he has read the foregoing petition; and knows the contents thereof and that he hereby makes solemn oath that the statement of facts therein contained is true according to the best of his knowledge, information and belief.

J. W. RAPPLE.

Subscribed and sworn to before me this 6th day of March, 1915.

[Seal] E. W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 2580. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Rapple, Petitioner, vs. Harry A. Dutton, as Trustee of the Estate of Lennig Engineering Company, a Corporation, Bankrupt, Respondent. In the Matter of Lennig Engineering Company, a Corporation, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Northern District of California, First Division.

Filed March 6, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2580

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt,

Appellee.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California,
First Division.

[Names and Addresses of] Attorneys.

J. C. CAMPBELL, WEAVER, SHELTON & LEVY, Esquires, Mills Building, San Francisco, California,

Attorneys for J. W. Rapple.

MANSFIELD & NEWMARK, Esquires, Merchants Exchange Building, San Francisco, Calif.

Attorneys for Harry A. Dutton, Trustee.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office—No. 7552.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue record containing: (1) Petition to review order of Referee; (2) Statement of facts on review thereof with the following corrections and omissions: (A) page 3, line 16, omit the word "Rapple"; (B) page 4, line 14, insert after the word "Copy" the words "of portions"; (C) page 5, lines 26–7, insert in lieu of the words "said corporation" the words "Lennig Engineering Company, a corporation"; (D) Omit all of said exhibit attached to statement except page 4, lines 10–13, beginning with the word "that"; page 5, lines 2–13 beginning with the word "that," page 7, lines 6–12 beginning with the

word "that" and ending with the word "otherwise," lines 22–29 beginning with the word "that"; (3) Order of District Court affirming order of the Referee; (4) Petition for appeal therefrom and allowance of said appeal; (5) Assignment of errors; (6) Citation and return thereon; (7) Stipulation of counsel extending time of appellant to file bond and docket cause to April 15th; (8) Bond on appeal; (9) Stipulation for record on appeal and petition to revise in matter of law.

DAVID L. LEVY,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Attorneys for J. W. Rapple.

[Endorsed]: Filed at 4 o'clock and —— min. P. M. Mar. 15, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk [1*]

In the United States Circuit Court of Appeals for the Ninth District.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Stipulation for Record on Appeal and Petition to Revise in Matter of Law.

It is hereby stipulated by and between the parties hereto and J. W. Rapple and Harry A. Dutton, Trustee herein, that the record on the appeal of said J. W. Rapple from, and the petition of said J. W. Rapple to revise in matter of law, the order of the

*Page-number appearing at foot of page of certified Transcript of Record.

District Court made October 3, 1914, affirming the order theretofore made by the Referee in bankruptcy, shall consist of the following: (1) Petition to review order of Referee; (2) Statement of facts on review thereof with the following corrections and omissions: (A) page 3, line 16, omit the word "Rapple"; (B) page 4, line 14, insert after the word "copy" the words "of portions"; (C) page 5, lines 26–7, insert in lieu of the words "said corporation" the words "Lenning Engineering Company, a corporation"; (D) Omit all of said exhibit except page 4, lines 10–13, beginning with the word "that"; page 5, line 2–13 beginning with the word "that"; page 7, lines 6–12 beginning with the word "that" and ending with the word "otherwise"; lines 22–29 beginning with the word "that"; (3) Order of District Court affirming order of the Referee; (4) Petition for appeal therefrom and allowance of said appeal; (5) Assignment of errors; (6) Citation and return thereon; (7) Stipulation of counsel extending time of [2] appellant to file bond and docket cause to March 15th; (8) Bond on appeal; (9) This stipulation.

DAVID L. LEVY,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Attorneys for J. W. Rapple.
MANSFIELD & NEWMARK,
MILTON NEWMARK,
Attorneys for Harry A. Dutton,
Trustee.

It is so ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Mar. 15, 1915, at 4 o'clock and —— min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [3]

In the District Court of the United States, Northern District of California, First Division.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Petition of J. W. Rapple for Review of Referee's Order.

To Honorable A. B. KREFT, Referee in Bankruptcy:

The petition of J. W. Rapple respectfully shows that your petitioner heretofore filed herein a petition for an order directing the Trustee herein to pay to Asbestos Manufacturing & Supply Company, a corporation, the sum of $783.44, or the balance thereof remaining in the hands of said Trustee, which sum had been received by said Trustee from United States Fidelity & Guaranty Company of Baltimore, a corporation.

That on the 28th day of May, 1914, an order was made and entered herein wherein and whereby said petition was denied and which order was in words following:

"The petition of J. W. Rapple herein is hereby denied."

That said order was and is erroneous in that said petition and the testimony adduced in support thereof shows that said fund in the hands of said

Trustee was the asset or the earning or increment of an asset which formerly belonged to Lennig-Rapple Engineering Company, a copartnership of which said petitioner, J. W. Rapple, was the retiring and one E. B. Lennig was the continuing partner after dissolution of said copartnership. That at the time of said dissolution said Lennig agreed [4] to pay the debts of said copartnership, and received an assignment of said Rapple's interest in the assets thereof. That said Lennig failed to pay such debts and that a judgment had been recovered against said copartnership by said Asbestos Manufacturing & Supply Company in the sum of $999.78 upon a debt owing by said copartnership. That said debt and said judgment were and are unpaid.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Law and General Order No. 27.

Dated June 5, 1914.

J. W. RAPPLE,
Petitioner.

J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Attorneys for Petitioner.

State of California,
City and County of San Francisco,—ss.

I, J. W. Rapple, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statement of facts therein contained is true according to my best knowledge, information and belief.

J. W. RAPPLE.

Subscribed and sworn to before me this 5th day of June, 1914.

[Seal] EUGENE W. LEVY,

Notary Public in and for the City and County of San Francisco, State of California. [5]

Receipt of a copy hereof is hereby acknowledged this 5th day of June, 1914.

MANSFIELD & NEWMARK.

[Endorsed]: Filed Jun. 5, 1914, at 11 o'clock and —— min. A. M. A. B. Kreft, Referee in Bankruptcy. [6]

In the District Court of the United States for the Northern District of California, First Division.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation, Bankrupt.

Statement of Facts on Review of Referee's Order upon Petition of J. W. Rapple.

On or about the 14th day of September, 1910, Lennig-Rapple Engineering Company, a copartnership consisting of the petitioner, J .W. Rapple, and E. B. Lennig, and having its principal place of business in said City and County of San Francisco, State of California, entered into a contract with the City and County of San Francisco, State of California, for the performance of certain labor and the furnishing of certain materials in the construction of a building to be erected by said City and County of San Francisco. At the same time the United States

Fidelity & Guaranty Company of Baltimore, Maryland, executed and delivered to said City and County of San Francisco its bond conditioned upon the due performance of said contract by said Lennig-Rapple Engineering Company. Said Lennig-Rapple Engineering Company commenced the performance of said contract and continued therein until the 30th day of December, 1910, at which date it had completed about 40% thereof.

On said 30th day of December, 1910, said Lennig-Rapple Engineering Company was dissolved and said J. W. Rapple retired [7] from the business which had theretofore been conducted by said partnership, and said E. B. Lennig continued to carry on said business.

Upon said dissolution said J. W. Rapple assigned, transferred and set over unto said E. B. Lennig all his right, title and interest in and to all of the assets and property which had theretofore belonged to said copartnership, including said contract with said City and County of San Francisco and at the same time it was agreed by and between the said J. W. Rapple and E. B. Lennig that said E. B. Lennig should assume the debts and obligations of said copartnership. Thereafter, on the 3d day of January, 1911, a notice of said dissolution and of said agreement on the part of said E. B. Lennig was published in a newspaper of general circulation in the City and County of San Francisco, State of California.

On the 5th day of August, 1911, said E. B. Lennig procured the incorporation under the laws of the State of California of Lennig Engineering Company.

Immediately thereafter said E. B. Lennig assigned, transferred and set over unto said Lennig Engineering Company, a corporation, all his right, title and interest in and to the assets and property which had formerly belonged to said Lennig-Rapple Engineering Company, a copartnership, including said contract between said Lennig-Rapple Engineering Company and said City and County of San Francisco. In consideration for the same, said Lennig procured said corporation to issue to him all of the capital stock of said corporation with the exception of four shares thereof, which were issued in the names of four other persons for the sole purpose of qualifying them to act as directors of said corporation. Said four other persons at no time had any real or actual interest in said corporation or in the business thereof. All [8] of the shares of the capital stock of said corporation excepting said four shares were thereafter and still and now are held by and in the name of said E. B. Lennig and said E. B. Lennig has at all times been and still and now is the sole person really and actually interested in said corporation or in the business thereof, and said corporation has at all said times been under his direction and in his control. At the time of said assignment, transfer and setting over by said Lennig of said assets of said corporation, said corporation had full and complete knowledge of all the facts hereinabove set forth.

After said dissolution said Lennig, as an individual, performed about 15% of the work of said contract and thereafter Lennig Engineering Company,

a corporation, performed about 15% of said work, but thereupon desisted and did no further act in the performance of the same and failed further to perform and failed to complete said contract. Thereafter, on the 13th day of May, 1912, said United States Fidelity & Guaranty Company of Baltimore, Maryland, as such surety for the performance of said contract undertook to complete the performance thereof and thereafter on or about the 20th day of October, 1912, duly and fully performed and completed the same, performing about 30% of said work. All materials and labor used in the performance thereof have been fully paid for and no claim is made for the price or value of any such materials or labor either in this proceeding or elsewhere. As a result of said performance, said United States Fidelity & Guaranty Company of Baltimore, Maryland, has received the sum of $783.44 over and above the sum expended in the performance of said contract.

On the 30th day of December, 1910, said Lennig-Rapple [9] Engineering Company, a copartnership, was indebted to Asbestos Manufacturing & Supply Company, a corporation, organized and existing under and by virtue of the laws of the State of California. Thereafter, on the 24th day of October, 1912, said Asbestos Manufacturing & Supply Company, a corporation, recovered a judgment in the Superior Court of the State of California in and for the City and County of San Francisco, against said Lennig-Rapple Engineering Company, a copartnership, for the sum of $999.78. The verified answer of

defendant, filed in said action, was introduced at the hearing, and a copy of portions thereof is attached hereto and marked Exhibit "A." The claim of said Asbestos Manufacturing & Supply Company against said copartnership was for labor performed and materials furnished under another contract between said copartnership and said City and County of San Francisco. Neither said debt owing to, nor said judgment recovered by, said Asbestos Manufacturing & Supply Company has been paid.

On the 30th day of October, 1912, said J. W. Rapple made demand upon said United States Fidelity & Guaranty Company of Baltimore, Maryland, that the latter pay said sum of $783.44 for the purpose of applying the same upon said indebtedness owing to the said Asbestos Manufacturing & Supply Company, or pay said sum to said Asbestos Manufacturing & Supply Company on behalf of said Rapple and of said copartnership. The Trustee herein also made demand for the said sum upon said United States Fidelity & Guaranty Company of Baltimore, Maryland, and thereupon procured an order to be made by the Referee in Bankruptcy herein directing said United States Fidelity & Guaranty Company of Baltimore, Maryland, said J. W. Rapple, said E. B. Lennig and said Lennig-Rapple Engineering Company, a copartnership, to appear and show cause before this Court why said sum should [10] not be paid to said Trustee. After proceedings had in the above-entitled cause, said Referee, by order given and made on the 4th day of September, 1913, directed said United States Fidelity & Guaranty Company of Bal-

timore, Maryland, to pay said sum of $783.44 to said Trustee, without prejudice to the claim of J. W. Rapple as hereinabove set forth. On the 11th day of November, 1913, in compliance with said order, said United States Fidelity & Guaranty Company of Baltimore, Maryland, paid said sum of $783.44 to said Trustee.

It was stated before said Referee, upon the hearing of said petition of J. W. Rapple, and on behalf of said J. W. Rapple, that his claim is made solely for the purpose of having said fund applied toward the payment of said debt of said copartnership to said Asbestos Manufacturing & Supply Company and that such payment might be made by the Trustee herein direct to said Asbestos Manufacturing & Supply Company. Said E. B. Lennig said in open court that he made no claim to the fund here in question either as an individual or as a member of Lennig-Rapple Engineering Company, a copartnership, but that said contract was assigned by said copartnership to him and by him to Lennig Engineering Company, a corporation.

It is stipulated by the parties hereto that the foregoing statement is a true and correct statement of the facts in connection with the petition of J. W. Rapple and that the same may be incorporated in the Referee's certificate on review of said Referee's order denying said petition.

DAVID L. LEVY,
Attorneys for Petitioner.
MANSFIELD & NEWMARK,
Attorneys for Trustee in Bankruptcy. **[11]**

Exhibit "A" [Portion of Answer].

* * * * * * * * *

That the total of work and material furnished by plaintiff and performed by plaintiff on said structure before the dissolution of said copartnership did not exceed the said $500.00 in value.

* * * * * * * * *

That, at the time of the said dissolution of copartnership, there was nothing due or owing to plaintiff for either work or materials performed on or furnished to said structure or otherwise on the contract alleged or otherwise and that subsequent to said dissolution of said copartnership and long prior to the commencement of this action the said plaintiff accepted the corporation defendant, Lennig Engineering Company, as its debtor for all of its claims for work and materials performed or furnished for said structure and released these defendants and each of them from all liability thereon and thereafter billed all of its said claims to said corporation defendant. **[12]**

* * * * * * * * *

That said copartnership was dissolved by mutual consent of said partners on the 30th day of December, 1910, at which time no extra materials had been furnished for said structure by said plaintiff; that, at the time of said dissolution of said copartnership there was nothing due or owing to plaintiff for extra materials or otherwise, as alleged in said complaint or otherwise;

* * * * * * * * *

that subsequent to the said dissolution of said co-

partnership and long prior to the commencement of this action the said plaintiff accepted the corporation defendant, Lennig Engineering Company, as its debtor for all its claims for work and materials performed on or furnished for said structure and released these defendants and each of them from all liability thereon and thereafter billed all of its said claims to said corporation defendant.

[Endorsed]: Filed Aug. 5, 1914. At 11 o'clock and —— Min. A. M. A. B. Kreft, Referee in Bankruptcy. **[13]**

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 7552.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

In Bankruptcy.

Order Affirming Order of Referee in Re Claim of J. W. Rapple Made May 28th, 1914.

The order of the Referee made May 28th, 1914, brought to this Court for review on petition of J. W. Rapple is hereby affirmed.

October 3d, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 3, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[14]**

In the District Court of the United States, Northern District of California, First Division.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

Bankrupt.

Petition of J. W. Rapple for Appeal and Order Allowing Appeal.

To the Honorable MAURICE *V.* DOOLING, District Judge, Presiding in the Above-entitled Court:

J. W. Rapple, who filed a petition in the above-entitled cause for an order directing the Trustee herein to pay to Asbestos Manufacturing & Supply Company, a corporation, $683.44, which sum had been received by said Trustee from the United States Fidelity & Guaranty Company of Baltimore, a corporation, feeling himself aggrieved by the order made and entered in this cause on the 3d day of October, 1914, denying said petition of said Rapple and affirming the order of the Referee in Bankruptcy herein denying said petition of said Rapple made and entered on the 28th day of May, 1914, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit for the reason specified in the assignment of errors filed herewith and does hereby respectfully pray that this, his petition for said appeal, be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, be sent to said

United States Circuit Court of Appeals for the Ninth Circuit. And said petitioner, desiring [15] to supersede any and all further proceedings in said cause, and particularly the distribution of said sum now in the hands of said Trustee or any part thereof, hereby tenders a bond in such amount as the Court may require for such purpose and prays that with the allowance of said appeal a supersedeas be issued.

Dated October 10, 1914.

DAVID L. LEVY,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Solicitors for J. W. Rapple.

Order Allowing Appeal With Supersedeas.

On reading and filing the above petition of J. W. Rapple and the assignment of errors presented therewith, it is hereby ORDERED that said appeal be allowed as prayed for and that said appeal shall operate as a supersedeas and shall stay all further proceedings in said cause, and particularly the distribution of said sum or any part thereof, upon the filing by said petitioner of a bond in the sum of $700.00, with two sufficient sureties.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 10, 1914, at 10 o'clock and —— Min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [16]

In the District Court of the United States, Northern District of California, First Division.

No. 7552—IN BANKRUPTCY

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

Bankrupt.

Assignment of Errors.

Now comes petitioner and appellant herein, J. W. Rapple, and files the following assignment of errors upon which he will rely on his appeal from the order made by this Honorable Court on the 3d day of October, 1914, in the above-entitled cause:

I.

The Court erred in ordering that the order of Referee in Bankruptcy, made on May 28, 1914, be affirmed.

II.

The Court erred in denying the petition of J. W. Rapple for an order directing the Trustee herein to pay to Asbestos Manufacturing & Supply Company, a corporation, the sum of $683.44, which sum was received by said Trustee from United States Fidelity & Guaranty Company of Baltimore, a corporation.

III.

The Court erred in that it did not decide upon the admitted facts in the record that said sum of $683.44 was an asset of the copartnership formerly known as Lennig-Rapple Engineering Company and consisting of E. B. Lennig and J. W. Rapple, which was subject to the lien or equity of said Rapple as the re-

tiring partner to have said fund used to pay the creditor of said former [17] copartnership, to wit, said Asbestos Manufacturing & Supply Company, a corporation, and that said fund had come into the hands of said Trustee impressed with the said lien or equity.

IV.

The Court erred in that it did not decide upon the admitted facts in the record that said fund constituted the proceeds of a contract formerly owned by said copartnership in which said Rapple had assigned his interest to said Lennig upon the agreement of said Lennig to pay the debts of said copartnership, and that since said Asbestos Manufacturing & Supply Company was a creditor of said copartnership and had recovered a judgment against it and said contract and proceeds had not passed into the hands of an innocent purchaser for value, therefore the fund was impressed with the lien or equity of the retiring partner, Rapple, to compel its use in the payment of the copartnership debt.

WHEREFORE, by reason of the errors assigned, appellant prays that said order be reversed.

DAVID L. LEVY,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
Solicitors for Petitioner and Appellant, J, W. Rapple.

[Endorsed]: Filed Oct. 10, 1914, at 10 o'clock and —— Min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[18]**

GASTON, SNOW & SALTONSTALL, Gen'l Counsel.

T. J. FALVEY, President. JOHN T. BURNETT, Sec'y and Treas.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Home Office: Boston, Massachusetts.

SURETY BONDS AND BURGLARY INSURANCE.

Employers' Liability Insurance.

Telephones—
Sutter 2750.
Home C. 4482.

Panama-Pacific-International-Exposition
San Francisco
1915
California.
California Department:
ROBERTSON & HALL, Mgrs.
D. E. DYER, Asst. Mgr.
First National Bank Building
San Francisco, Cal.

In the District Court of the United States, Northern District of California, First Division.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

Bankrupt.

Bond on Appeal for Costs and Supersedeas.

KNOW ALL MEN BY THESE PRESENTS: That we, J. W. RAPPLE, as principal, and Massachusetts Bonding and Insurance Company, a Corporation, as Surety, are held and firmly bound unto Harry A. Dutton, Trustee, in the above-entitled cause, in the amount of $700.00 to be paid to said Trustee, his successors or assigns for the payment of which sum well and truly to be made we bind ourselves and each of us, our and each of our heirs, successors, executors and administrators, jointly and severally, firmly by [19] these presents. Sealed with our seals and dated this 2d day of March, 1915.

WHEREAS said J. W. Rapple, petitioner in the above-entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order of the District Court of the United States, for the Northern District of California, made and entered herein on the 3d day of October, 1914, and

WHEREAS said J. W. Rapple desires during the progress of said appeal to stay the proceedings in said cause, and particularly the distribution of the sum of $683.44 now in the hands of said Trustee or any part thereof;

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant shall prosecute said appeal with effect and pay all costs which may be awarded against him as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for

the Ninth Circuit in said cause or on the mandate of said United States Circuit Court of Appeals, then this obligation shall be void, otherwise the same shall remain in full force and effect.

MASSACHUSETTS BONDING AND INSURANCE COMPANY. (Seal)

By: FRANK M. HALL,

And: S. M. PALMER,

Attorneys in Fact.

[Endorsed]: Filed Mar. 6, 1915, at 11 o'clock and 45 Min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [20]

In the District Court of the United States, Northern District of California, First Division.

No. 7552—IN BANKRUPTCY.

In the Matter of LENNIG ENGINEERING COMPANY, a Corporation,

Bankrupt.

Stipulation Extending Time [to Docket Cause, etc.].

It is hereby stipulated by and between the parties hereto that the appellant, J. W. Rapple, may have to and including the 15th day of April, 1915, within which to file his bond on appeal, docket cause and for supersedeas.

Dated March 12, 1915.

MANSFIELD & NEWMARK.

MILTON NEWMARK.

So ordered:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed at 4 o'clock and —— Min. P. M. Mar. 15, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [21]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing twenty-one (21) pages, numbered from 1 to 21, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Lennig Engineering Company, a Corporation, Bankrupt, numbered 7552, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praecipe" and "Stipulation for Record on Appeal and Petition to Revise in Matter of Law," copies of which are embodied in this transcript, and the instructions of the attorneys for appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of Ten and 80/100 ($10.80) Dollars; and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein (pages 23 and 24).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of April, A. D. 1914.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled April 8, 1915. C. W. C.] [22]

Citation on Appeal—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Harry A. Dutton, Trustee of the Estate of Lennig Engineering Company, a Corporation, Bankrupt, Walter D. Mansfield, Milton Newmark and Mansfield & Newmark, Solicitors for Said Trustee and to the Creditors of Said Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein J. W. Rapple, who filed a petition in the Matter of Lennig Engineering Company, a Corporation, Bankrupt, pending in said court, for an order directing you, the said trustee, to pay to Asbestos Manufacturing & Supply Com-

pany, a Corporation, the sum of $683.44, which sum had been received by you, the said trustee, from United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 10th day of October, A. D. 1914.

M. T. DOOLING,
United States District Judge. [23]

[Endorsed]: No. 7552. United States District Court for the District of California. In the Matter of the Estate of Lennig Engineering Company, Bankrupt, Appellant. Citation on Appeal. Filed Oct. 10, 1914, at 12 o'clock and 45 Min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

[Endorsed]: No. 2580. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Rapple, Appellant, vs. Harry A. Dutton, as Trustee of the Estate of Lennig Engineering Company, a Corporation, Bankrupt, Appellee. In the Matter of the Lennig Engineering Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeal

from the United States District Court for the Northern District of California, First Division.

Filed April 15, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the Circuit Court of Appeals, Ninth Circuit.

No. ——.

In the Matter of LENNIG ENGINEERING COMPANY,

Bankrupt.

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, Trustee,

Respondent.

Stipulation [and Order Allowing Appellant to December 15, to Docket Cause, etc.].

It is hereby stipulated by and between the parties to this appeal that appellant may have to and including the 15th day of December, 1914, in which to docket the above cause and to file his bond on appeal.

MANSFIELD & NEWMARK,
Attorneys for Respondent.
DAVID L. LEVY,
Attorney for Appellant.

So ordered:

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 2580. In the Circuit Court of Appeals, Ninth Circuit. In the Matter of Lennig Engineering Company, Bankrupt. J. W. Rapple, Appellant, vs. Harry A. Dutton, Trustee, Respondent. Stipulation Extending Time to Docket Cause and File Bond. Filed Nov. 18, 1914. F. D. Monckton, Clerk, Refiled May 1, 1915. F. D. Monckton, Clerk.

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No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING CO., Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

J. C. CAMPBELL, WEAVER, SHELTON & LEVY,
Attorneys for Appellant.

Filed this.....day of May, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed
MAY 15 1915

PERNAU PUBLISHING COMPANY

No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING CO., Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

The issue here is presented by an appeal from and petition to revise the order of the District Court made in a controversy between the appellant, Rapple, and the trustee in bankruptcy concerning the disposition of a certain fund in the custody of the trustee. The facts were stipulated as follows:

Prior to December 30, 1910, Lennig-Rapple Engineering Co. was a copartnership consisting of J. W. Rapple and E. B. Lennig. Its assets were

chiefly contracts for work and material; among them were two with the City and County of San Francisco, one on the Hall of Justice and the other on the County Jail. The performance of the latter was secured by a bond executed by United States Fidelity & Guaranty Co., hereinafter called the Guaranty Co. Upon said date forty per cent of this contract had been performed. The partnership was then dissolved, Rapple retiring and Lennig continuing to transact the business. By the agreement of dissolution, Rapple transferred to Lennig his interest in the firm assets, including said contracts, and Lennig assumed the firm debts, paying Rapple $6000 in cash, and giving him a note for $2800. Lennig thereafter continued in the performance of these contracts, doing about fifteen per cent of the work on the County Jail, until August 5, 1911, when he procured the incorporation of Lennig Engineering Co., hereinafter called the corporation. He transferred his interest in the former partnership assets to the corporation and procured it to issue to him all of its capital stock except four shares used to qualify dummy directors. Lennig remained at all times the owner of the stock and the only person actually interested in the corporation. The corporation took these assets with full knowledge of all the facts.

The corporation thereupon performed fifteen per cent of the work on the County Jail and then defaulted, so that the Guaranty Co., as surety upon the contract, undertook to complete it and did so on

October 12, 1912, having performed the remaining thirty per cent of the work. After paying out of the contract price for all materials and labor used, it had on hand a balance of $783.44. The corporation had meantime become a bankrupt.

On said October 30, 1912, Rapple and the corporation's trustee in bankruptcy both made demand upon the Guaranty Co. concerning this fund. The trustee claimed it as an asset of the bankrupt; Rapple's claim was based upon the following facts: A portion of the contract of the partnership on the Hall of Justice had been sublet by it to Asbestos Manufacturing & Supply Co., hereinafter called the Supply Co. The latter furnished labor and material for the price of $999.78, for which it had not been paid. It sued the partnership under the firm name and on October 24, 1912, recovered a judgment against it. Rapple asked that the profit made on one of the former partnership contracts should be used to pay the loss suffered in the other, for which he was personally liable.

A hearing upon the subject was had before the referee, who, on September 4, 1913, directed the Guaranty Co. to pay the fund to the trustee without prejudice to Rapple's claim. Directly the money was in the hands of the officer of the court, Rapple petitioned that it be used to pay the claim of the Supply Co. on file in the bankruptcy proceeding. The petition was denied, and on review in the District Court the order of the referee was affirmed.

The jurisdiction of this court is invoked by appeal from, and petition to revise, said order, which, appellant contends, was erroneous in that it, in effect, denied the relief sought.

II.

Brief of Argument.

The gist of this case is the retiring partner's equity invoked in respect to a firm asset which is in the custody of the court. The fundamental principle has been incorporated in the Civil Code of California:

> "Sec. 2405. Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance if any due to him."

The contract upon the County Jail was an asset of the partnership. By reason of Lennig's agreement upon dissolution to pay the firm debts, this asset continued to be subject to the equity or lien of Rapple which attached as well to the profit which the contract had the capacity to produce. Lennig failed to pay the debts; in a suit against the partnership the Supply Co. recovered a judgment, upon which Rapple is, of course, personally liable. He is entitled, therefore, to invoke his equity in the asset in the hands of the court, and to compel its application upon the partnership debt.

Lennig's transfer to the corporation does not alter the situation, because it was not a *bona fide* purchaser, but was merely a form under which Lennig did business. Rapple's equity therefore prevailed.

The principle of equity upon which we rely is well established in the authorities. In *Conroy v. Woods,* 13 Cal. 626, a partnership was dissolved, two members selling the assets to a third, who agreed to pay the debts. The court held:

> "It has been seen that Bonny bought out the other two partners and agreed to pay the firm debts. * * * Bonny then held the firm assets; and the question is, having got the title to them in this way, whether they stood anywise differently as respects the firm creditors than if the firm had continued? If the firm had continued, it is not disputed that the rights of the firm creditors would have been prior and paramount to those of an individual creditor; and it is not easy to see any substantial difference in respect to the principle we are considering, between one partner's buying out his associate's share on agreement to pay the debts of the firm, and suffering the firm name to continue. This was partnership property bound for partnership debts when the firm was in existence, and it continued to be bound for those debts after the sale to this partner, especially when he assumed, as a part of the transaction, of purchase, the payment of those debts" (p. 631).

In *Allen v. Cooley,* 31 S. E. 634 (S. C.), the facts were stated by the court as follows:

> "By the terms of the dissolution the plaintiff agreed to receive, and did receive, in full of his interest, a tract of land estimated at $3500, and

> two notes of D. K. Cooley, indorsed by T. D. Cooley, for $790 each, * * * one payable on 1st of November, 1898, and the other payable on 1st of December, 1898; and all the other assets of the firm—real as well as personal—were turned over to the defendant D. K. Cooley, he agreeing to pay all the debts of the firm, and releasing plaintiff from any liability therefor" (p. 642).

The court held:

> "The partnership assets were left in the hands of D. K. Cooley, with an obligation on his part to apply the same to the payment of the partnership debts, in relief of the plaintiff, and are in fact impressed with a trust for that purpose. If so, then the plaintiff unquestionably would have a right in equity to take any suitable measures for the protection of that trust fund, and enforce its application for the purpose for which it was intended, so as to relieve himself from loss" (p. 645).

It was held that the retiring partner was entitled to the appointment of a receiver for the preservation of the former firm assets, notwithstanding that the continuing partner was not shown to be insolvent.

In *Buchan v. Sumner,* 2 Barb. Ch. 165, 197, the court states its decision in two earlier cases as follows:

> "That an assignment by one of the partners, or by his personal representatives, of his or their interest in the surplus, was not a relinquishment of the equitable claim to have the debts of the firm paid out of the copartnership funds, where the rights of bona fide purchasers were not involved."

The same principle is applied in *Tenney v. Johnson,* 43 N. H. 144; *Jones v. Newson,* Fed. Cas. No. 7484, and *Bulger v. Rosa,* 6 N. Y. Supp. 38.

In passing upon the situation presented by the dissolution of a partnership by the death of a member, the Supreme Court held, in *Shanks v. Klein,* 104 U. S. 18, 22, quoting from a Massachusetts decision:

> "Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners?"

In *Holmes v. Baker & Hamilton,* 160 Fed. 922, the adjudication of a member of a dissolved partnership for an act of bankruptcy committed thereafter was attacked. This court held in affirmance:

> "The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims."

The precise question was presented *In re Filmar,* 177 Fed. 170. There the partnership of Swigert & Filmar dissolved, the former selling his interest to his partner in consideration of a money payment and the latter's agreement to pay the firm debts. He continued in business for a time, paying all the creditors but Lippincott, and then was adjudicated a bankrupt. The property turned over to the

trustee had formerly belonged to the firm. The opinion states:

> "Thereupon Lippincott filed his petition, asking that his debt be paid from the assets ahead of the claims of Filmar's individual creditors; and Swigert filed a like petition, asking the same relief, without offering to repay the consideration he received on selling his interest to Filmar. The final decree dismissed these petitions for want of equity; and the petitioners have severally appealed."

The Court of Appeals for the Seventh Circuit held:

> "With the property in custody and all the parties present, and no rights of innocent purchasers or transferees having intervened, a court of general equity powers would concededly award priority to Lippincott, because there had been no application of the property, with the consent of the partners, to the payment of individual debts (Sargent v. Blake, 160 Fed. 57), because Lippincott in his own right as a partnership creditor would be entitled to equity's rule of distribution, and because Swigert for his own protection would have the right to ask that Lippincott be first paid."

The court then quotes from the Bankruptcy Act and proceeds:

> "These provisions, we think, indicate very clearly that Congress intended that the bankruptcy courts should have full equity powers in dealing with partnership matters. The particular objection here seems to arise from the fact that Swigert and the partnership were not before the court as bankrupts."

In overruling this objection the court held:

> "Under the various provisions of section 5, what procedure on Lippincott's part would have been necessary or possible in order to invoke the full equity powers of the bankruptcy court in case Swigert had not voluntarily appeared and filed his petition, we will not now inquire; for, with his appearance, the bankruptcy court had before it all parties in interest, and his petition was a consent that the partnership property be administered by that court in accordance with the equitable principles approved by Congress."

Aside from the factor that Lennig's corporation, and not Lennig himself, is the bankrupt here, the analogy between the case cited and the one at bar is perfect. The element of difference is not material. As the court for the Seventh Circuit held, the case was governed by principles of equity applied in the bankruptcy proceeding. We have already demonstrated that the retiring partner's equity in the former firm asset now in the custody of the court is the source of Rapple's right which was not destroyed by Lennig's transfer of the assets to the corporation, first, because the latter took with notice and, as the court pointed out in the *Filmar* case "no rights of innocent purchasers" have intervened and there has been "no application of the property, with the consent of the partners, to the payment of individual debts"; and, second, because the transfer to the corporation was no transfer at all, in that equity, piercing the veil of corporate entity, perceives the identity between Lennig and his corporation, thus circumventing the

fraud upon Rapple which would result if his rights were held divested by the incorporation. This doctrine has been applied, for example, in a case where a partnership and its two members had been adjudicated bankrupts. They had done business for some time in the name of a corporation organized by them in which they and their wives were the only stockholders. On demand by the referee, the bankrupts refused to produce the books of the corporation. The matter was certified to the district judge, who held:

> "The examination of the books should be allowed and made, so far as to ascertain what sums if any were owing to the Horgan and Slattery corporation at the time of the adjudication, because the circumstances already in evidence justify the court in treating the corporation as a mere fiction, and the sums due it as assets of the bankrupts."
>
> *In re Horgan*, 97 Fed. 319.

In *Colonial Trust Co. v. Monticello Works*, 172 Fed. 310, it was held:

> "While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation, yet it is equally well settled, courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms" (p. 313).

This court held in *Exploration Co. v. Pacific Co.*, 177 Fed. 825:

> "The corporate entity cannot be so disguised that it can successfully masquerade in the name

> of a stockholder. * * * A court of equity looks through forms to the substance of things, thus preserving the rights of innocent parties against all deception and fraud'' (p. 839).

Where parties sold letters patent and then organized a corporation in which they owned all the stock, and which was made a defendant in an infringement suit, it was held in *Force v. Sawyer-Boss Co.*, 111 Fed. 902:

> "The defendant corporation is estopped by this act of the persons who created, direct and own its capital stock, and are its sole directors and officers."

Other cases of the identity of a corporation and the person who owns all of its stock are

> *Venner v. Farmers' Co.,* 90 Fed. 348, 356 (C. C. A. 6th Cir.);
> *In re Berkowitz,* 173 Fed. 1013.

Rapple's equity in the fund in the hands of the court is, therefore, paramount.

The case here should not be confused with that presented in a plenary proceeding brought by firm creditors, or their representative, after dissolution of the partnership to recover funds formerly belonging to it, which have been used by the continuing partner to pay his individual debt. In such a case, notwithstanding the promise of the continuing partner on dissolution to pay the debts, the creditors have no remedy, because the retiring partner has not asserted his equity and the former firm money or property is not in court but, on the con-

trary, is in the hands of a third party taking in good faith and for value. The retiring partner's equity is thus no longer effective. The creditors' right, derivative in character, is also lost; and it is only where the property is *in custodia legis* that the subject matter exists for an original application by creditors to have the firm assets marshalled. The case of *Sargent v. Blake,* cited in *Re Filmar,* is one of the class here distinguished. Another is *Case v. Beauregard,* 99 U. S. 119, an authority upon which the *Sargent* case is based. There the partners disposed of firm property in payment of the individual debt of one of them. It was held that a firm creditor could not by suit in equity vacate the transaction. In the course of the opinion, in discussing by way of *dictum* the effect of a transfer of partnership property it is said that the partner has an equity and not a specific lien for the payment of firm debts.

The distinction which we have pointed out is again very clearly defined in *Re Terens,* 175 Fed. 495. In respect to the decisions of the Supreme Court it is held:

> "It is strenuously insisted in argument that these authorities are decisive in the instant case. But it will be observed that in each of the cases cited certain of the firm assets had been sold by consent of all partners to third parties, so that a complete legal title to the specific items of personal property passed to the purchaser and amounted to a complete waiver of this equitable right, and constituted a release of such assets from firm liabilities. In

> the instant case there has been no such disposition. The status of the firm assets was precisely the same on the 12th of January that it was on the 15th of December. The only change wrought by the dissolution agreement was in the attitude of Oswald, who by virtue thereof became a surety for the firm obligations. Brandt on Suretyship and Guaranty, Sec. 36. I cannot see that this change in the legal attitude amounts to a waiver on the part of Oswald which would defeat the equity of the firm creditors" (pp. 498-9).

The court goes further in that case than is necessary here; it gives a preference to the firm creditor although no application is made therefor by the retired partner. Both members were insolvent at dissolution; but that this is not material is plain from the cases of *Case* and *Filmar*. The decision is no doubt correct, because the court was called upon to administer a former firm asset. While not so deciding, the court in *Re Filmar* suggested that in a proper case relief might be given upon the application of the creditor.

Since a property right is involved here, the status of the firm asset and Rapple's equity in it is to be determined according to the law of California announced in *Conroy v. Woods* (supra). As the court held in *Re Scruggs*, 205 Fed. 673, 675, quoting in part:

> "And it is well settled that the trustee takes not as a bona fide purchaser for value, but as the bankrupt held the property, subject to all valid claims, liens and equities.

> "The validity of such claims, liens and equities is to be determined in the absence of federal statutes by the local law as evidenced by the decisions of the state courts."
>
> *Thompson v. Fairbanks,* 196 U. S. 516;
>
> *Knapp v. Milwaukee Trust Co.,* 216 U. S. 545.

Conroy v. Woods has never been questioned, and stands for the doctrine that the partner's equity survives after dissolution by reason of the continuing member's promise to pay the debts, and that a firm creditor may enforce this equity even though the asset is not *in custodia legis.* Although it is not necessary so to decide here, such are, no doubt, the legal principles which control in the case at bar.

Some point may be made upon the contents of the answer filed by the partnership in the action brought against it by the Supply Co. The dissolution was pleaded and issue of novation and acceptance of Lennig as the debtor in the place of the firm was raised. The judgment against the partnership was, of course, a finding against this defense. In any event, it is one of the stipulated facts that the Supply Co. is a creditor of the firm. This cannot be impugned.

It will be contended by the appellee that inasmuch as the partnership performed only forty per cent of the contract from which the profit accrued, Rapple's equity should under the maxim "equality is equity" be operative only upon forty per cent of the profit. But the right which is invoked here

attached to the entire contract, including any increment which it was capable of producing. The profit represents the excess of contract price over the cost of the materials and labor used in its performance; it stands now in the place of the contract; the contract was the potentiality—the profit the actuality. Equity will, therefore, require that it be used to pay the creditor of the partnership whose claim represents the loss suffered under the other partnership contract. Surely, such a proceeding is in full accord with the justice of the situation.

Dated, San Francisco,
May 10, 1915.

Respectfully submitted,

J. C. Campbell, Weaver, Shelton & Levy,
Attorneys for Appellant.

No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,
Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of Lennig Engineering Co., Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

MANSFIELD & NEWMARK,
MILTON NEWMARK,
Attorneys for Appellee.

Filed this.....day of May, 1915.

Filed
MAY 21 1915
F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,
Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of Lennig Engineering Co., Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

The question presented in this appeal concerns the right of J. W. Rapple who had sold his interest in a partnership, which consisted of himself and E. B. Lennig, to his copartner Lennig, to require the application of a certain alleged partnership asset to the payment of the debt of a partnership creditor, which debt had been reduced to judgment against the partnership and the members thereof.

On the 30th of December, 1910, the Lennig-Rapple Engineering Co., a partnership, consisting of J. W.

Rapple and E. B. Lennig, was dissolved by mutual agreement of the partners. Lennig bought out Rapple's interest, took over the partnership assets and assumed the partnership debts. Lennig paid to Rapple, as consideration for Rapple's interest in the partnership business and assets, $6000 in cash and a promissory note for $2800. (The fact that Lennig paid to Rapple $6000 in cash and the promissory note of $2800 was omitted from the agreed statement of facts by mistake but this fact was found by the referee, is admitted by appellant and is stated by him in the statement of the case contained in appellant's brief at page 2 thereof.) Although as stated, Lennig assumed the partnership debts, there was no agreement that the partnership assets should be used for the purpose of paying partnership debts. There is no suggestion that the partnership nor either of the copartners was at this time insolvent. There is also no suggestion of fraud or bad faith in the transaction. Lennig continued the business as sole owner until August 5, 1911, when he organized the Lennig Engineering Co., a corporation, and transferred to it the assets of the business, receiving as consideration therefor stock in the corporation. The corporation continued the business for about one year thereafter when it was adjudged a bankrupt and the appellee herein is the trustee in bankruptcy of the estate of said corporation.

One of the assets in the hands of the appellee, as such trustee in bankruptcy, is a fund of $783.44

which arose as follows: The partnership had entered into a contract with the City and County of San Francisco to perform certain work on the county jail and this work was partly performed at the time of the dissolution of the partnership, and was continued both by Lennig as an individual and thereafter by the Lennig Engineering Co., a corporation, and was finally taken over and completed by the bonding company which had guaranteed to the City the completion of the contract. The fund in question represents the profit made upon this contract.

The Asbestos Manufacturing and Supply Co. is the judgment creditor of the partnership holding judgment against the partnership and the members thereof. This creditor has filed its claim in the bankruptcy proceedings as a debt against the corporation. Appellant, Rapple, requires that this fund in the hands of the trustee be applied to the payment of the debt of the Asbestos Manufacturing and Supply Co.

II.

NO PARTNER'S LIEN.

Appellant bases his claim upon the retiring partner's lien or equity and argues that the right of a partner to require the application of the partnership property to the discharge of partnership debts persists after dissolution of the partnership. There is no rule in law nor principal of equity that sanc-

tions such a claim under the facts here presented. While the partnership is solvent and a going concern, its creditors have no lien upon nor equity against its assets, and such assets can be transferred free from any lien or equity. There is no more reason why the partnership could not sell its assets free from lien than why a solvent individual could not do so. There is no more reason why the partnership could not sell its assets to Lennig than to a third person. He paid his price therefor and took the full and absolute title.

The parties, it is true, might have contracted that the partnership property should be applied to the payment of the partnership debts but this they did not do and Rapple now calls upon the court to make such a contract for him. Nor is there any equity in Rapple's position which would incline the court in such a direction. The judgment creditor has not asked that this application of the fund be made to the payment of his debt, nor has he joined in Rapple's request. It is Rapple who has sold these assets to Lennig and who has received the price therefor, who alone claims an equity or lien upon them. The parties whose interests are now at stake are no longer Lennig and Rapple, but on the one hand, Rapple, who seeks to have the judgment of the Asbestos Manufacturing and Supply Co. against him satisfied, and on the other hand, the individual creditors of Lennig or of the Lennig Engineering Co., a corporation, who are represented by the appellee, the

trustee in bankruptcy. Rapple makes no offer to return the $6000 in cash and whatever moneys he may have realized upon the promissory note of $2800, and yet these were individual assets of Lennig and were withdrawn from the reach of Lennig's creditors by the bargain from which Rapple now seeks to be relieved.

> "Retiring partners may, effectually, sell not only their firm interests but also the specific property of the partnership to a remaining partner who assumes the debts, even though insolvent, and thus convert firm property into individual property."
>
> *Remington on Bankruptcy,* Second Edition (1915), Section 2269.

> "A valid sale of the partnership property by the firm to one or more of its members, or to a new firm in which some of the former partners are members, puts an end to the old partnership title and destroys the lien of the partners thereon, as well as the preference of the old partnership creditors therein over the individual creditors of the purchasing partner."
>
> *30 Cyc.* 545.

> "The (partner's) lien is lost by the conversion of the partnership property into the separate property of a partner. Thus, for instance, where one partner buys the interest of his copartner he takes the property discharged of his copartner's right to have the debts paid therefrom."
>
> "Where a retiring partner sells his interest to his copartner and the latter assumes and agrees to pay the debts, the lien on the assets

is divested, and the personal obligation of the partner is substituted therefor."

22 Am. & Eng. Enc. Law (2nd Ed.) p. 133.

The text in both *30 Cyc.* and *22 Am & Eng. Enc. Law* is supported by a long list of cases cited in the footnote.

Bates on Partnership.

"Sec. 550. The right of a partner to have the assets applied to pay the debts ceases when he parts with his interest in the assets, as where partners convert their joint interests into separate interests. Hence where a partner retires from the firm, selling or assigning his interest to the continuing or remaining partners he loses his equitable right and can no longer apply as partner, for an accounting and receiver. * * *

"Sec. 551. The fact that the continuing partner, or if a third person, who buys the interest and becomes a partner, assumes the debts and agrees with the retiring partner to indemnify or save him harmless or to pay the debts, does not preserve the lien." (Citing many cases.)

In the extended note to *Dean v. Collins,* 9 L. R. A. n. s. 49, a large number of cases is collected and the author says, page 102:

"The great preponderance of authority holds that the rule that a sale by a partner of his interest in the partnership assets, or a division of the partnership assets between the partners, effects a waiver or surrender of the individual partner's equity, to which creditors are entitled to be subrogated, to have the firm assets applied to the payment of the firm debts; and that the partnership lien to secure such application

thereupon terminates,—is not altered or affected by the fact that the purchase, or the taking, of a share in severalty, is made upon or in consideration of an assumption of partnership debts. Thayer v. Humphreys, 91 Wis. 276, 30 L. R. A. 549, 51 Am. St. Rep. 887, 64 N. W. 1007; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065; Maquoketa v. Willey, 35 Iowa 329; Griffith v. Buck, 13 Md. 102; Croone v. Bivens, 2 Head 339; Smith v. Edwards, 7 Humph. 106, 46 Am. Dec. 71; Blackwell v. Farmers' & M. Nat. Bank, 97 Tex. 445, 79 S. W. 518.

"In such case property of the partnership ceases to be joint property; and the lien or equity of the retiring partners to make a sale of the property and an application of the proceeds to the joint debts is destroyed. West v. Chasten, 12 Fla. 315; Griffin v. Orman, 9 Fla. 22; Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223; Cory v. Long, 2 Sweeney 491; Baker's Appeal, 21 Pa. 76, 59 Am. Dec. 752; Webster v. Lawson, 73 Wis. 561, 41 N. W. 710."

Lindley on Partnership (1888), Vol. II, page 603.

"The lien may be lost, either by a *bona fide* sale to a third person, or by the retirement of one partner who disposes of his interest to the other, or to a third person, with his copartner's consent, and who takes the assumption of his copartner or of a third person to discharge all the firm debts."

Story on Partnership, 5th Ed., (1859).

"Sec. 358. It has already been suggested that the rights of antecedent creditors of the partnership are in nowise varied by the dissolution of the partnership. It may be added, that, upon the dissolution, it is competent, for the partners, in case of a voluntary dissolution, to

> agree that the joint property of the partnership shall belong to one of them; and if this agreement be *bona fide,* and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors. * * * The reason of this is obvious. While the partnership is solvent, and going on, the creditors have no equity, strictly speaking, against the effects of the partnership. Neither have they any lien on the partnership effects for their debts." * * *

The decisions cited by the foregoing authors show the overwhelming weight of authority to be against the contention of appellant.

The equitable marshalling of assets so as to apply partnership assets to partnership debts after the property has come into *custodiam legis* is a very different thing from interfering with the contracts made by the parties while the partners are solvent and the business is a going concern. This distinction is pointed out in

> *Sargent v. Blake,* 20 A. B. R. 115; 160 Fed. 57 (C. C. A. Mo.):
>
> "There are two rules of law which at different times apply to the management and disposition of the property of a partnership; first, partners own, and with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts the creditors

> of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property, and until that time the second rule is ineffective. Before the partnership property is placed in *custodia legis* for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. * * * It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudications in bankruptcy unless they were actually fraudulent or voidably preferential."

In *Case v. Beauregard,* 99 U. S. 119, 125, the Supreme Court say:

> "So, if before the interposition of a court is asked the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any

> preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus in Ex parte Ruffin (6 Ves. 119), where from a partnership of two persons one retired, assigning the partnership property to the other and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the asignment of the retiring partner is not *mala fide.*"

Fitzpatrick v. Flannigan, 106 U. S. 648, follows and quotes *Case v. Beauregard,* supra. To the same effect also is *Huiskamp v. Wagon Company,* 121 U. S. 310.

Counsel cites in support of his argument *Conroy v. Woods,* 13 Cal. 626:

In this case various matters of fraud are charged in the bill, the contest was between individual and firm creditors both attaching within a few days after dissolution and the decision doubtless effected substantial judgments under the facts before the court.

In *Schleicher v. Walker,* 28 Florida 698 (10 So. 33); and in *Thayer v. Humphreys,* 91 Wis. 276 51 A. S. R. 887); the case of *Conroy v. Woods,* supra, is examined, and the courts state that it is in conflict with the weight of authority and they refuse to follow it; both cases holding that if a partner sell out to his copartner, *bona fide,* that the

property conveyed is converted into individual property of the purchaser free from all equities of the seller.

In *Bates on Partnership,* Sec. 562, *Conroy v. Woods,* supra, is cited in support of an exception to the general rule which we have quoted from this author above.

> "Many cases hold that if the firm is insolvent, or on the eve of insolvency, and both partners are also insolvent, a purchase by one partner of the interest of the other in consideration of the former's assumption of the debts is upon a consideration which is of no value whatever, and according to the English and American authorities, no equivalent having been given, the transfer is in effect voluntary and its only effect, if sustained would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the creditors."

The case of *Allen v. Cooley,* 31 S. E. 634, also cited by appellant, presented a case where one partner sold his interest to another under agreement that the debts should be paid by the continuing partner. The complaint alleged that the assets were being wasted, and that the remaining partner had entered into a fraudulent scheme and had fraudulently transferred the assets. The court held that the retiring partner presented a case for equitable relief.

Buchannan v. Sumner, 2 Barb. Ch. 165, is a case of foreclosure of mortgage; and *Shanks v. Klein,*

104 U. S. 18, concerns the rights of creditors on the death of one partner against the partnership assets and neither case is in point.

Homes v. Baker and Hamilton, 160 Fed. 922, holds that a partnership and its members may be adjudicated bankrupts on an act committed by all the members even after a dissolution and this by express provision of statute (Bankruptcy Act, 5A).

In the case of *In re Filmar,* 177 Fed. 170, the claim for priority is pressed by a partnership creditor who from the first refused to accept the continuing partner as a debtor. In this case, the continuing partner was evidently insolvent at the time of dissolution of the copartnership, for within a few weeks thereafter he was adjudged a bankrupt and scheduled no property other than the original partnership property and all of his debts were individual debts excepting that of the contesting creditor.

In *Loveland on Bankruptcy,* 4th Ed. (1912) page 554, vol. I, *In re Filmar,* supra, and *In re Terens,* 175 Fed. 495 (which case is also cited by counsel) are distinguished from the general rule upon the ground of insolvency.

> "A sale by one partner to his copartner, when the firm is insolvent, which if held would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is considered fraudulent and the property distributed as firm property. (In re Terrens, 175 Fed. 495, 23 A. B. R. 680; In re Filmar, 177 Fed. 170, 24 A. B. R.

190; In re Worth, 130 Fed. 927, 12 A. B. R. 566; In re Head, 114 Fed. 489, 7 A. B. R. 556; In re Cooke, Fed. Case 3150 (3 Biss 122); Collins v. Hood, Fed. Case 3015 (4 McLean 186). But it is competent for solvent partners to make any arrangements which they think proper with respect to their joint property in the partnership, or the separate property of the partners, and to alter the character of the property so as to convert joint into separate property and vice versa. Such agreement, if made bona fide, will bind the creditors, and in the event of bankruptcy the property will be administered as firm or separate property, according to the character which the partners have placed upon it."

III.

THE CORPORATION IS A LEGAL ENTITY.

It will be remembered that not Lennig individually, but the Lennig Engineering Co., a corporation, is the bankrupt in these proceedings. Lennig has never been adjudged a bankrupt. Counsel for appellant states (brief, page 9) that this is immaterial; first, because the corporation took with notice; and second, because equity "perceives the identity between Lennig and his corporation, thus circumventing the fraud upon Rapple which would result if his rights were held divested by the corporation". These two reasons are inconsistent because the first assumes that the corporation is, and the second that the corporation is not, a legal entity. The fact that the corporation took with knowledge is immaterial. We are not claiming that the corporation is a trans-

feree without notice. We urge that the transfer of the business, its assets and its liabilities, from Lennig to the corporation, effected a material change which alone would distinguish this case from all of those cited by appellant. Lennig is not before the court in these proceedings. His assets are not being here administered. His individual creditors are not before the court, and have no right to participate. The trustee in bankruptcy, the appellee upon this appeal, is not a representative of Lennig's individual creditors, but of a different set of creditors, to wit, those of the corporation. That Lennig may have individual creditors who are not creditors of the corporation goes without saying. Yet these are the persons who are particularly interested in contesting the claim of Rapple.

That the Lennig Engineering Co. is a valid corporation and a distinct legal entity is clear. The agreed statement of facts admits its incorporation. There is no element of fraud suggested in connection with its creation or with the transfer of the engineering business from Lennig to the corporation. The only fact upon which the argument is based is that Lennig owned practically all of the issued stock.

In the leading case of *Salomon v. Salomon*, L. R. App. Cas. 1897, page 22, Lord Halsbury says:

> "My Lords, I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted---that the business was the business of Aron Sal-

omon, and that the company is variously described as a myth and a fiction. * * *"

"My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered."

And Lord Watson says at page 35:

"What is meant by the assertion that the company 'was the mere nominee or agent' of the appellant I cannot gather from the record; and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider."

And Lord Herschell says at page 43:

"The other shareholders, too, are said to have been 'dummies', the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess."

And Lord Macnaghten said at page 51:

"The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are man-

agers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. * * *"

"It has become the fashion to call companies of this class 'one man companies'. That is a taking nickname, but it does not help one much in the way of argument."

The fact that in these very proceedings the corcorpation has been adjudged a bankrupt is alone conclusive of its distinct legal entity.

IV.

THE FUND NOT A PARTNERSHIP ASSET.

The nature of the asset which is claimed by the retiring partner further distinguishes this case from all of those cited by counsel. The fund here in controversy, it will be remembered, represents the final profit upon a contract which was executed partly by the partnership, partly by Lennig as an individual, partly by the Lennig Engineering Co., a corporation, and partly by the bonding company. The fund thus represents the fruits not only of the partnership's efforts, but also of the labor of Lennig as an individual, and also of the corporation. Such a state of facts presents a very different case from those decisions such as *Conroy v. Woods,* supra, where a certain physical asset of the partnership was fastened upon by attaching creditors of both

the partnership and of the continuing partner. If it could be said that Rapple had an equitable lien upon this fund at all it could extend only to whatever interests the partnership had in the contract and could not, in any event, exceed 40% thereof.

Dated, San Francisco,
May 20, 1915.

Respectfully submitted,

MANSFIELD & NEWMARK,
MILTON NEWMARK,
Attorneys for Appellee.

No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING CO., Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

J. C. CAMPBELL, WEAVER, SHELTON & LEVY,
Attorneys for Appellant.

Filed this ..... *day of May, 1915.*

Filed

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FRANK D. MONCKTON, *Clerk.*

F. D. Monckton,

By ..... *Deputy Clerk.*

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APPELLANT'S REPLY BRIEF.

Appellee's brief avoids the two principal points of appellant's argument; first, that the firm asset is *in custodia legis* and will be disposed of according to equity's rules of administration, and second, that since Rapple asserts a property right in the asset, the law of California as announced in *Conroy v. Woods* is controlling. Appellee adroitly substitutes a different issue—whether according to the weight of authority the agreement of the continuing partner on dissolution to pay the debts maintains the partner's equity in force, *eliminating the fact that the asset is in court.* Upon this substituted

issue appellee presents a convincing case; but it does not reach the real question to be decided here.

Thus appellee states our contention as follows:

> "Appellant bases his claim upon the retiring partner's lien or equity and argues that the right of a partner to require the application of the partnership property to the discharge of the partnership" (brief, p. 3).

In reply we point to the keynote of our argument: "The gist of this case is the retiring partner's equity invoked in respect to a firm asset *which is in the custody of the court*" (opening brief, p. 4). This is the basic factor which appellee has seen fit to ignore.

This subject—*custodia legis*—first appears in appellee's brief at page 8. The point of the statement there is far from clear. The impression is conveyed that we are asking the court to "interfere" with the contract of the parties here and that there is no occasion for marshalling of assets. Let us analyze the matter.

Clearly, this is a case where equity is called upon to administer the fund in court. If then, appellee's statement means that under the facts here equity will not marshal the former firm assets at the request of the retired partner so as to give to Rapple the benefit of Lennig's covenant to pay the debts and protect Rapple against loss while there remain firm assets available for the purpose, it is only necessary to say in reply that the *Filmar* and *Sargent* cases stand for this very proposition. And

far from "interfering" with the contract of the partners, equity will give effect to its purpose.

The quotation from the *Sargent* case at pages 8-9 of appellee's brief is erroneously arranged. The extract last quoted following the asterisks appears in the opinion at 160 Fed. 63 in the paragraph preceding that with which appellant introduces his quotation. And the latter is followed by the statement of the principle which appellee has failed to quote that the derivative right of firm creditors does not come into being until the asset is brought into court. The decision there does not concern the right of the retired partner. He was not a party. It was held merely that notwithstanding insolvency of the firm and its members, the continuing partner after dissolution and within four months prior to bankruptcy could with former firm assets pay an individual debt to one taking in good faith and the trustee could not recover them in a plenary action. The assets were not in court and *there was no occasion for applying the equitable rule of administration.* As the Court of Appeals said in meeting the contention of the trustee that assumption of the debts by the continuing partner on dissolution created a trust in favor of the partnership *creditors:*

> "It had no such effect at any time before the $3,731.90 was paid to Mrs. Sargent or before an application was made for the *interposition of a court to administer the partnership property.*"

The implication is plain that if the former firm asset had come into *custodia legis* after the dissolution and before transfer to a third person taking in good faith, the *creditors'* equity would have been available. And such was precisely the decision in the *Filmar* case where the situation was, as here, reinforced by the presence of the retired partner invoking his original equity. Thus did the court there distinguish the *Sargent* case. And the decision in *Case v. Beauregard,* presenting the same facts as in *Sargent v. Blake,* and upon which the result in the latter is based, is distinguishable in the same way.

Appellee devotes a short paragraph to an endeavor to avoid the force of the striking analogy in *Re Filmar.* He states that the claim there was "pressed by a partnership creditor who from the first refused to accept the continuing partner as a debtor" (p. 12). This is not urged as a ground of distinction but, lest it be so considered, we may point out that the creditor here is in the bankruptcy court, that it was the request by the retired partner that swept aside all objections to equitable administration in the *Filmar* case, and that if the Supply Co. here had accepted Lennig as its debtor, it would no longer have been a firm creditor and this controversy would not have arisen; in fact, as appears from the extract from the record, the defense of novation was raised in the suit against the partnership and must have been rejected.

Only one other suggestion is offered by appellee in this connection. He says:

> "The continuing partner was evidently insolvent at the time of dissolution of the copartnership, for within a few weeks thereafter he was adjudged a bankrupt and scheduled no property other than original partnership property and all of his debts were individual debts excepting that of the contesting creditor" (p. 12).

But appellee omits to mention that as the court said: "By payment and *novation* Filmar very shortly settled all partnership debts except one". The former firm creditors who were not paid thus became individual creditors of Filmar. It may be that he had no other creditors. It does not appear but that he used his personal funds to pay firm creditors. In the six weeks' period that elapsed he may have dissipated the firm assets concerning which the court said referring to the time of dissolution: "Partnership assets were then in excess of partnership debts". Thus, appellee's conclusion that Filmar was insolvent when the firm was dissolved is without support. It is a gratuitous assumption. Moreover, it is not likely that the decision of the Court of Appeals was based upon a fact which is not stated in its opinion, but must be deduced argumentatively from a collection of circumstances gathered at random. However, the court distinctly gives its reasons for deciding in favor of the retired partner (opening brief, p. 8); every one of them is present in the case at bar. And

finally, the immateriality of insolvency is plain from the *Sargent* case, where the firm and both members were insolvent and the creditors were denied relief (see Syllabus 1, by the court).

Appellee's statement (p. 12) that in *Loveland on Bankruptcy* the *Filmar* case is "distinguished from the general rule upon the ground of insolvency" is decidedly erroneous. The case is cited by Mr. Loveland in a footnote to the text quoted by appellee; no distinction whatever is pointed out—the statement is made as one of many instances when property is considered as a firm asset. Moreover, while the text may correctly state the law, the citation of *Re Filmar* in its support is an error. The text concerns the situation where a sale is made "by one partner to his copartner, when the firm is insolvent". In the *Filmar* case it is distinctly said that at the time of the sale by the outgoing partner "partnership assets were then in excess of partnership debts".

One word, before leaving this subject, concerning the quotation by appellee (p. 5) from *Remington on Bankruptcy*. The subject-matter of the section quoted from is the line of cases which we have just discussed. The author states before citing the *Sargent* case:

> "The assumption of payment of partnership debts by one partner in consideration of an absolute transfer to him of the partnership property by the other creates no trust in and fastens no lien upon the property thus transferred in favor of partnership *creditors* prior

to any application to a court to interpose and assume administration of the property" (Sec. 2269, p. 2144).

There follows in the same section a discussion and extended quotation from the *Filmar* case.

We conclude from the foregoing that without regard to the situation of the firm creditor or even the retiring partner in a plenary proceeding where the former firm property is in the hands of a third person taking for value, it is established that when the asset is *in custodia legis* before the rights of innocent parties have intervened, the partner's equity must prevail. This principle has reached its full development in the bankruptcy courts, since the publication of the texts cited by appellee (pp. 5-8) in which it is not considered. And since these texts are concerned with the law of partnership alone, it is not surprising that the matter here in question is not discussed.

Appellee is thus clearly in error in drawing from his quotations which do not concern an asset *in custodia legis* the conclusion that the weight of authority is against our contention. Appellee has failed to produce a single precedent reaching the point involved here. The decisions of the courts of bankruptcy without exception confirm Rapple's right to require the fund in court to be administered as he requests.

But whether or not according to the weight of authority the covenant of the continuing partner to

pay firm debts preserves the retiring partner's lien, regardless of the other circumstances present here, such is the law of California and other states.

Appellee's attitude toward *Conroy v. Woods,* 13 Cal. 626, is not plain. At page 11 he quotes from *Bates on Partnership* concerning transfers between insolvent partners. Mr. Bates proceeds in his text to state the facts and conclusions in a case upon the subject; and in a note thereto the *Conroy* case is cited among many others. But an examination of the opinion in the *Conroy* case discloses no suggestion that either the firm or any member was was insolvent. The only mention of the subject was an averment that the sheriff who had levied upon the former firm asset was insolvent—made, no doubt, to bring the case within equitable jurisdiction and to obtain the injunctive relief desired. This was granted, however, without regard to the financial condition of the sheriff. In passing, it is notable that Mr. Bates' text is based upon precedents which are now obsolete. The contrary is directly decided in *Sargent v. Blake,* in consonance with the weight of authority (see Syllabus 6 and p. 65).

The sole ground of decision in *Conroy v. Woods* is quoted at page 5 of our opening brief. It determines squarely that under a dissolution such as the one involved here the firm property continued to be bound for firm debts. Appellee's indorsement of the statement of the Florida and Wisconsin

courts that the *Conroy* case is opposed to the weight of authority (brief, p. 10), is a tacit admission of the validity of our contention. For, as pointed out in the opening brief, Rapple's rights are to be determined according to the law of this state as evidenced by the decision of its highest court. Appellee has failed utterly to answer or even to mention this decisive feature of the case at bar.

It should be borne in mind that because of other facts in this case, appellant is not put to the necessity of relying upon the argument just outlined. An additional and independent reason is presented in support of the prayer for reversal.

Appellee has criticized our argument concerning the effect of Lennig's transfer to the corporation upon the ground that two inconsistent reasons are relied upon. Our contentions are, of course, cumulative; it is only upon the assumption for argument's sake that the corporate entity will be considered here at all that it becomes necessary to assert that the corporation took with notice. However, there is no inconsistency. Appellee says that the latter contention assumes, while the former denies, that the corporation is a legal entity. This is an error. Both concede *legal* entity; the first argument is that this factor will not prevent *equity* from protecting a property interest enforceable only in that forum by ignoring the corporate form which would, however, be conclusive in a court of law.

Appellee confesses: "We are not claiming that the corporation is a transferee without notice" (pp. 13-14). There is, then, no controversy. Rapple's equity is as effectual as if the asset were in the hands of Lennig. Appellee's suggestion that Lennig may have creditors who are not in court is not relevant; nor is the fact that the trustee here does not represent them. No rights of Rapple can be divested by the matter of the trustee's representation. The trustee, as well as the creditors of the corporation, stand in its shoes, and have no greater or better right, nor any equity which can undercut that of Rapple.

In reply to our other contention, appellee merely quotes from the well known case of *Salomon v. Salomon*. This decision does not in any way derogate from the federal authorities cited in our opening brief. The question before the House of Lords was simply whether or not Salomon had effected a legal incorporation of his company, so that the latter's creditors could not compel him to satisfy its debts. The circumstances leading up to the incorporation were thus stated by Lord Macnaghten:

> "Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners: they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. 'They troubled me', says Mr. Salomon, 'all the while'. So at length Mr. Salomon did what hundreds of others have done under similar

> circumstances. He turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family" (A. C. p. 49).

Difficulties were encountered—destructive trade conditions and labor troubles.

> "The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could; both he and his wife lent the company money" (p. 49).

It was held:

> "But when once it is conceded that they (the other shareholders) were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess" (Lord Herschell at p. 43).

It was accordingly decided that the company could not, while insisting in court by prosecuting the action that it was a legal entity, compel Salomon to indemnify it against claims of creditors, subsequently created, on the theory that there was no *bona fide* incorporation.

> "The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of pur-

> chase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion, the statute casts upon them the duty of making inquiry in regard to these matters" (Lord Watson at p. 40).

Here, on the contrary, is involved a property right existing prior to the incorporation. By organizing a company in which he alone was interested, and transferring to it the property in which his former partner's right inhered, Lennig could not destroy that right. If necessary to protect and enforce it, equity will view the case as if Lennig and his creditors were before the court. The creditors and their trustee standing in the place of the corporate bankrupt have no cause to complain.

A word, before concluding, concerning the fund in court. It is stipulated to be "profit"—meaning the excess of sale price over cost price or the balance remaining after the payment out of the contract price of the cost of materials and labor supplied by sub-contractors in performance. Thus it does not represent the value or price of the constituents of performance; else it would not be a profit. It was produced by the Guaranty Company in undertaking the completion of the contract for which it became responsible as the surety for the *partnership*. Therefore, appellee's effort to limit Rapple's equity to 40% of the fund should not prevail.

A few miscellaneous statements requiring a word in reply are made at pages 4-5 of appellee's brief. It is said that the Supply Company has not asked that the fund be used to pay its claim. But the courts have without exception held that the partner and not the creditor has the equity or lien invoked here. The creditor's claim is before the court; in the *Filmar* case the court observed that the fact that the partner had filed the petition disposed of all procedural objections.

Rapple's position is criticized because he has not offered to return the consideration paid him upon dissolution. But as the court in *Re Filmar* expressly points out, such was the case there. And there is no reason why Rapple should. The continuing partner made his own bargain and received full performance. His obligations were only partly carried out; there remains unperformed his covenant to pay the debts so that the retired partner will not be compelled to do so. Equity seizes the firm asset for this purpose; neither Lennig's creditors nor those of his corporation can complain. Thus the contract as made is enforced; Rapple is not seeking, as appellee asserts, to have a different contract made for him.

Dated, San Francisco,
May 29, 1915.

Respectfully submitted,
J. C. Campbell, Weaver, Shelton & Levy,
Attorneys for Appellant.

No. 2580

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. RAPPLE,

Appellant,

vs.

HARRY A. DUTTON, as Trustee of the Estate of LENNIG ENGINEERING CO., Bankrupt,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

CAMPBELL, WEAVER, SHELTON & LEVY,
Mills Building, San Francisco,
Attorneys for Appellant and Petitioner.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2580

IN THE

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Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant Rapple respectfully asks that the decision of the court herein be set aside, and a rehearing be granted.

This is a proceeding in bankruptcy seeking the application of an asset of the partnership of Lennig and Rapple to the payment of a firm creditor. This court has decided (1) that equity will so distribute

the asset in the custody of the bankruptcy court only if the firm was insolvent at dissolution; and (2) that the law in California although in favor of Rapple's contention, does not establish a rule of property binding upon the federal court. Appellant respectfully submits that the reasoning upon which both of these conclusions rest deserves reconsideration.

1. The firm asset is in the custody of the court and should be applied to pay the firm debt; the case of Filmar so decides and this court's statement that the partnership of Filmar and Swigert was insolvent at the time of dissolution is opposed to the facts of that case.

The weight of authority is undoubtedly (as this court holds), that a retiring partner's lien is lost upon a dissolution such as the one at bar. But the first of our contentions was and is that if the firm asset is placed *in custodia legis* before it passes into the hands of a *bona fide* purchaser, a court of equity at the instance of the retired partner, will give the firm creditor priority. We cited *In re Filmar,* 177 Fed. 170, as a case directly in point. The opinion of this court states that the distinctive feature of the *Filmar* case was the insolvency of the partnership at dissolution. We believe, on the other hand, that it was the fact that the firm asset was in the custody of the court. We ask this court's indulgence while this decisive question is considered.

The language of this court is as follows:

> The opinion (in the *Filmar* case) recites that the partnership assets were then in excess of the partnership debts, but notwithstanding that fact it may be assumed that the partnership was found to be insolvent, for within six weeks after the dissolution Filmar filed his voluntary petition in bankruptcy.

This statement is the gist of the decision here. With due respect, we believe that a moment's consideration will suffice to demonstrate that it is open to serious question.

If at dissolution the assets of the partnership of Swigert and Filmar "were in excess of its debts", is not that conclusive of the solvency of the firm? Is it not self-contradiction to say that such a firm is insolvent?

The meaning of insolvency is given in Words and Phrases:

> Insolvency, in its general sense, is a term used to denote an insufficiency of the entire property and assets of an individual to pay his debts. (citing cases.)

The Bankruptcy Act of 1898 defines insolvency:

> A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed, or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation be sufficient in amount to pay his debts. (Sec. 1.)

Plainly, then, excess of assets over debts precludes the idea of insolvency. Moreover, a partnership is not insolvent unless the assets of the firm, *together with those of the partners as individuals,* are collectively insufficient to pay the firm debts. This was decided by the Circuit Court of Appeals for the Sixth Circuit in *Vaccaro v. Security Bank,* 103 Fed. 436, where Justice Lurton after stating this rule concluded:

> The decided and clear weight of the evidence is that the aggregate of the property of the firm and of the individual estates of A. Vaccaro, B. Vaccaro, and A. B. Vaccaro, who composed the partnership, after deducting exemptions, dower of the widow of A. Vaccaro, and making provisions for the individual debts of each, was, at "a fair valuation, sufficient in amount to pay all of the debts of the partnership". A. Vaccaro & Co. were, therefore, not insolvent on August 23 or 24, 1900, within the definition of the bankrupt act. (p. 444.)

Thus Swigert's personal assets were to be considered as well in determining the financial status of the partnership at dissolution. His sound condition is demonstrated by the fact alone that Swigert instituted the proceeding to save himself from the necessity of paying the partnership debt. We, therefore, respectfully submit that the firm of Swigert and Filmar was not insolvent at dissolution.

Let us go further and consider the reason assigned by this court for its conclusion. It is said that "within six weeks after dissolution Filmar filed his voluntary petition in bankruptcy". Appellee here, in an endeavor to distinguish the *Filmar* case,

was content to suggest that this incident led to the conclusion that the continuing partner was insolvent. In response to this we pointed out (and it is equally pertinent to the reasoning of the court's opinion) that in six weeks of Filmar's sole incumbency in the business, its affairs may have undergone and no doubt did undergo a complete change. Through poor business judgment and, perhaps, use of the funds in his personal affairs, Filmar may have dissipated the assets. (Reply Brief, p. 5.)

The assumption of insolvency of the firm resting upon the fact of Filmar's subsequent bankruptcy is, we respectfully submit, unwarranted. It is an *assumption* in direct conflict with the *facts* stated as the basis of the decision.

It is also noteworthy that from the fact that "Filmar filed his voluntary petition in bankruptcy" it does not necessarily follow that he was insolvent. A solvent debtor may employ the medium of the bankruptcy court to have his assets distributed among his creditors (*Collier on Bankruptcy,* 8th Ed., p. 96). Is it likely, however, that Filmar was insolvent. But it is conceivable (as we said in the reply brief) "that the decision was based upon a fact which is not stated in its opinion"? Should we not, rather, look to the reasons given by the court as the basis of its conclusion? These are: that the property was in the custody of the court and there has been no application of it to the payment of individual debts. *Sargent v. Blake,* 160

Fed. 57, is then cited—a case where the partnership was insolvent at dissolution but the firm creditors were denied relief *because the assets had been transferred to a bona fide purchaser prior to an occasion for their administration in a court of equity.*

In our reply brief (page 6) we pointed out that in the first paragraph of Judge Sanborn's syllabus in *Sargent v. Blake* it is stated that both the partnership and its members were insolvent. Notwithstanding this, the endeavor to recover the firm asset in a plenary proceeding from one who had taken it for value failed. Yet this court immedately after quotation from the *Sargent* case draws this distinction:

> A different rule applies where the transfer is by one of two partners to the other of his interest in an *insolvent* partnership.

The court then proceeds to discuss the *Filmar* case. Is it not clear that *Sargent v. Blake* is a case of an insolvent partnership and the *re Filmar* is not? It is respectfully submitted that the decision of this court is opposed to the conclusion reached in an identical case (*Filmar*) by the Court of Appeals for the Seventh Circuit and that the basic principle upon which the decision here rests is directly in conflict with the law as laid down by the Court of Appeals for the Eighth Circuit (*Sargent v. Blake*) in consonance with the decisions of the United States Supreme Court—*Case v. Beauregard; Fitzpatrick v. Flannagan.*

These authorities establish that the essential to the preference of the firm creditor at the instance of the retired partner is that the asset is *in custodia legis* and not, as this court has held, that the firm was insolvent at dissolution. Whether insolvency would produce the result for which we contend is not of vital importance here; it is sufficient for the purposes of this case that before the firm asset was transferred to a *bona fide* purchaser, it came into the bankruptcy court and is here subject to equity's rule of distribution at the instance of the retired partner.

2. Conroy v. Woods establishes a lien—a property right—of the retired partner in the firm asset after dissolution; this is a rule of property and the title of the trustee is subject to Rapple's lien.

The court has declined to apply the rule announced in *Conroy v. Woods*, 13 Cal. 626, upon the ground that it "involves no construction of a state statute, nor does it establish a rule of property, but it decides a principle of equity only, and it is not binding on a federal court". Here the court has failed to notice that the status of partnership assets is now in California a matter of statutory provision. By Sec. 2405 of the Civil Code (opening brief, page 4), a lien in favor of the partner is created in firm assets to have them applied to the discharge of the firm debts. The statute does not limit the existence of the lien to the period during

which the partnership continues as a going concern. A partnership does continue, in contemplation of law, nowithstanding dissolution, until its debts are paid. This court so held, as we pointed out at page 7 of the opening brief, in *Holmes v. Baker & Hamilton,* 160 Fed. 922.

The *Conroy* case (decided before the statute was enacted) held that the partner's lien persisted after dissolution where (as here) the continuing member assumed the debts. All the authorities concede the existence of that lien before dissolution. This is a property right. And in this state it survives the dissolution. Therefore, the asset involved in this case was prior to the bankruptcy impressed with a lien in favor of Rapple. Did the bankruptcy destroy it? It is settled law that the trustee takes the assets as the bankrupt held them, subject to all claims, liens and equities. Authorities to this effect and holding further that the validity of such liens "*is to be determined in the absence of federal statutes by the local law as evidenced by the decisions of the state courts*" were cited in the opening brief (pages 13-14) but have not been noticed in the opinion of this court.

It is universally held that before dissolution each partner has a lien and that the firm assets are subject to a trust in favor of the partner to ensure the payment of the firm debts. This lien or trust is equally operative under the law of California upon the fund now in court as before the dissolution. A lien is clearly a property right; if this is true of

the claim of a beneficiary upon a trust fund, Rapple's position is doubly secure. The Supreme Court has so decided in a recent case reported since the briefs herein were written—*Brown v. Fletcher,* 235 U. S. 589. There the matter of diversity of citizenship was involved. The trustee and beneficiary of a trust fund were citizens of New York. The latter assigned his right to a citizen of Pennsylvania who sued the trustee in the federal court. If this were a mere *chose in action* or a claim upon contract, jurisdiction under Sec. 24 of the Judicial Code would have failed. But the Supreme Court held that even though the trust *res* were funds in cash, the right of the beneficiary was a *property right* and on that ground sustained the federal jurisdiction.

The failure of the court to appreciate that Rapple is relying here upon a property right and not upon an equitable remedy nor a rule of equitable distribution is perhaps due to the fact that the discussion of this question was immediately preceded by a consideration of the principle of marshalling assets in the bankruptcy court as laid down in such cases as *in re Filmar.* In that case, under the rule of that jurisdiction, there was no partner's lien after dissolution and therefor no property right was involved. The contention of the retired partner was based upon "equity's rule of distribution" of the fund in court. So, with this idea in mind this court no doubt proceeded to consider Rapple's claim as of the same

character. But in this aspect of Rapple's position, he is not restricted to a prayer for an equitable distribution of the fund; he relies upon a rule of property laid down by the court of the state in which the asset is located and which has exclusive power to regulate the title to personal property within its limits. This is a radical distinction.

An examination of the authorities cited by this court in its opinion serves to confirm what we have said:

In *John Deere Plow Co. v. M'David*, 137 Fed. 802, the bankrupt had received funds belonging to the claimant and converted them in the transaction of his business, so that neither the funds nor any property substituted for them could be identified. Thus, there was no specific *res* involved upon which a trust or equity could be fastened. The claimant, therefore, sought to establish a preferred claim against the entire estate of the bankrupt. There was no right in specific property involved. The question was one of equitable preference—like in the *Filmar* case—and the decision of the state court that under such facts the claimant should have "a preference upon the entire body of the trustee's estate in insolvency upon the ground that the trust fund has enhanced the estate", was not controlling. The case is, therefore, not in point here.

In support of the following statement: "this rule is especially applicable to questions of equity law,

as to which federal and state courts appeal to the same sources of information", this court has cited *Butler v. Douglas,* 3 Fed. 612. The question there was whether a federal court of equity should adopt as the period of limitation in a suit to foreclose a vendor's lien the length of time required to bar an action at law for the purchase money, and what effect the decision of the state court should have. It was held:

> In the determination of *such a question of equity law* the federal and state courts appeal to the same sources of information, and the decisions of either are not binding on the other.

The decision is thus far afield from the case at bar. Moreover, its value as authority is extremely questionable, because the Supreme Court of the United States has reached a contrary conclusion in an analogous case—*Dupree v. Mansur,* 214 U. S. 161. It was there held:

> Where it is established law of a State, as it is of Texas, that when a debt is barred by limitations an action to foreclose a lien or mortgage given as security for it is barred also, the law must be enforced in the courts of the United States, whether sitting in law or in equity.
>
> Whether or not the statute of limitations bars a suit to foreclose is a question of substantive law, created by the State and not by the United States, and not one of procedure or jurisdiction; and the federal court should be governed by the decisions of the State where the land lies. (Syll. 1, 2).

In *Lane v. Vick,* 3 How. 464, it was held that the construction of a particular will by the state court was not conclusive upon the federal court where the decision had not become a rule of property. This is not pertinent to the facts at bar. The theory underlying such a decision is clearly explained in a later case—*Russell v. United States Trust Co.,* 127 Fed. 445:

> The federal courts adopt the local law of real property, as ascertained by the decisions of the state courts, whether grounded on the construction of statutes or the unwritten law of the state, including that pertaining to the construction of wills. But upon the question whether the expression of a testator, in his will, of a wish or recommendation, will create a trust, the decisions of the state courts merely afford a guide in applying the general rule that the intention of the testator is to be effectuated. (p. 446.)

Oates v. Bank, 100 U. S. 239, and *Railroad Co. v. National Bank,* 102 U. S. 14, both presented the question whether one who receives a promissory note as security for an existing indebtedness is a purchaser for value. This, plainly, involves no property right, but merely a matter of general commercial law and thus does not touch the instant case.

Liverpool Co. v. Phoenix Ins. Co., 129 U. S. 397, another case cited in the opinion, was a suit in admiralty where a stipulation exempting a common carrier from responsibility for the negligence of its servants was considered. The nature of the

question as well as the forum in which it was raised required the independent judgment of the federal court.

But one other case is cited by this court—*Loewe v. Federation of Labor,* 189 Fed. 714. The exercise of the equitable power of injunction was there in question. It was held that in applying such "general principles of equity" the court would determine for itself "what those principles are".

These authorities, we submit, are far afield from the issue at bar. No one of them is nearly so pertinent as the cases upon which Rapple relied in his brief. In order to present more fully to this court his plea for a reconsideration of the cause, we will look further into the decisions upon the question.

The authorities hold, without exception, that where the title to real or personal property is involved the rule of decision established by the state tribunal will govern the federal court. The decisions to be cited do not involve a construction by the state court of a local statute, but concern the law of judicial decision.

In *Dooley v. Pease,* 180 U. S. 126, the decision of the state court concerning the effect of possession of personal property was followed. It was held:

> It is equally well established that the courts of the United States regard and follow the policy of the state law in cases of this kind.

> "Any other rule," said this court in *Green v. Van Buskirk,* 7 Wall. 139, "would destroy all safety in derivative titles and deny to a State the power to regulate its personal property within its limits." (p. 128.)

This case is cited and followed in *Re Richheimer,* 221 Fed. 16 (C. C. A. 7th Circ.) where it was held:

> That ownership and transfer of and liens upon personal property which has come within the state are subject to and controlled by the policy adopted by the state for regulation and control thereof (p. 23.)

In *Re Antigo Screen Door Co.,* 123 Fed. 249 (C. C. A., 7th Circ.), in determining the rights of the parties to a fund of the trustee in bankruptcy derived from the sale of personal property, the court held that it was governed by the law concerning chattel mortgages as decided by the state Supreme Court.

Other bankruptcy cases are numerous in which rights in personal property covered by mortgage have been adjudicated. In *Dodge v. Norlin,* 133 Fed. 363 (C. C. A., 8th Circ.)—a bankruptcy proceeding—it was held:

> The decisions of the highest judicial tribunal of the state in which a chattel mortgage is made determine its validity in the national courts. (p. 379.)

In *Dugan v. Beckett,* 129 Fed. 56 (C. C. A., 5th Circ.), also a bankruptcy case, it was held:

> In determining whether a chattel mortgage executed by a bankrupt was fraudulent on its

> face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property. (Syllabus 1.)

The same decision is reached in *In re First National Bank,* 135 Fed. 62 (C. C. A., 6th Circ.).

The existence of an attorney's lien upon a fund was the question in *Cain v. Hockensmith Wheel Co.,* 157 Fed. 992, it was held:

> Whether an attorney has a lien for services rendered on money recovered as the result of his efforts is a matter of local law not to be disposed of on independent views entertained by the federal courts. (Syllabus 2.)

The decisions of the state court were consulted and followed.

The rights of the parties in a bankruptcy proceeding to personal property under pledge were determined by the same rule in *Security Warehousing Co. v. Hand,* 206 U. S. 415. It was held:

> There was no valid disposition of the property in the case before us, or of any valid lien. The so-called warehouse receipts issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which State they were issued. In such case this court follows the state court. (p. 425.)

Again, in a case where a contract concerning personal property was involved in *In re East End Mantel Co.,* 202 Fed. 275, the court held:

> The law of the state wherein a contract of sale or pledge is made and is to be performed must govern in the bankruptcy court in determining its validity. (Syllabus 1.)

The rights of the parties under a contract of conditional sale of personal property were adjudicated in the same way in *Bryant v. Swofford Bros.,* 214 U. S. 279. It was held:

> * * * In bankruptcy the construction and validity of such a contract must be determined by the local laws of the State. That such a contract is a conditional sale and is valid without record is the law of Arkansas (citing decisions of the state court). The trustee has no higher rights in this regard than the bankrupt. (pp. 290-1.)

In determining the effect of a contract the court held in *In re Heckathorn,* 144 Fed. 499:

> In a proceeding against a bankrupt's trustee to recover certain goods alleged to have been bailed and not sold to the bankrupt, whether the contract constituted a bailment or a sale is governed by the local law. (Syllabus 1.)

The rule is, of course, equally well settled in the case of vendor's liens. In *Slide Gold Mines v. Seymour,* 153 U. S. 509, the rule of decision in Colorado recognizing the vendor's lien—the creature of equity—was held to govern the federal court (pp. 516-17).

In *Consolidated Smelting Co. v. Hinchman,* 212 Fed. 813 (C. C. A. 1st Circ.), the rule that the trustee in bankruptcy takes property subject to the

equities impressed upon it by the bankrupt was applied. The court held:

> By the law of Arizona (where the land is situated), as stated in Baker v. Fleming, 6 Ariz. 418, there is no implied lien for unpaid purchase money. In other words, the creature of equity, known as a vendor's equitable lien, which is based upon the fact that the purchaser has not paid for what he has received, does not exist in Arizona and is regarded as contrary to the policy of that state. * * *
>
> We must give due effect to the decision in Baker v. Fleming, and this precludes us from raising upon equitable principles a charge for which the parties have not contracted. (p. 824.)

And so in *Minah Mining Co. v. Briscoe,* 89 Fed. 891, this court held:

> Such a lien is never created by contract. Equity creates and enforces one in proper cases, and, when recognized in the state in which is situated the property in respect to which it is asserted, the federal courts will recognize and enforce it. (p. 895.)

And coming nearer to the facts at bar, in *Perin v. Megibben,* 53 Fed. 86 (C. C. A., 6th Circ.), it was held:

> If the court of appeals of Kentucky have clearly laid down in their decisions a principle affecting the devolution of the equitable title to partnership real estate upon the death of one partner, it is a rule of property which the federal courts will respect and follow, instead of exercising their independent judgment, as they do with reference to questions involving the general common law of the state. (p. 92.)

The same principle is, under the precedents above cited, applicable in the case of personal property of a partnership. The *Perin* case is thus direct authority in the case at bar.

These authorities compel this conclusion: since the California court has determined that the partner's lien upon the assets of the firm subsists after dissolution and a subsequent statute has confirmed the lien without restricting its duration to the period of existence in fact of the partnership, a rule concerning the title to property has been established which the federal courts should not overthrow. Upon principle, is not this conclusion a just and proper one? Rapple and Lennig drew their contract of dissolution shaping their respective rights in the firm assets in contemplation of the law as adjudicated in this state. Under that contract, Rapple was entitled to believe that his lien was not destroyed. Must he apprehend that a court will apply to it the laws of other jurisdictions that a covenant "to apply the assets to the payment of the debts" is necessary to the desired result? If the controversy had arisen in the state courts, Rapple's property rights would have been protected. Should his rights be lost because the asset came into the custody of the bankruptcy court? The authorities say not. The record shows that the asset here was in the hands of the Fidelity & Guaranty Company before it was turned over to the trustee. Rapple could have sued the Guaranty Company in the state court and had that tribunal determine his rights. In liti-

gating his lien in the federal court, must he lose it because the courts of *other states* have held that such an agreement as he signed fails to preserve it? It is respectfully submitted that this as well as the first issue decided by this court should be reconsidered.

Dated, San Francisco,

October 25, 1915.

CAMPBELL, WEAVER, SHELTON & LEVY,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

DAVID L. LEVY,
Of Counsel for Appellant and Petitioner.

No. 2581

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

MUNICIPALITY OF SEWARD, ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed
APR 9 - 1915
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled here accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court for the Territory of Alaska, Third Division.

Names and Addresses of Attorneys of Record.

Mr. J. LINDLEY GREEN, Seward Alaska,
Attorney for Plaintiff and Defendant in Error.

Mr. S. O. MORFORD, Seward, Alaska,
Attorney for Defendant and Plaintiff in Error.

[2*]

In the District Court for the Third Judicial Division, Territory of Alaska.

S—38.

IN THE MATTER OF THE DELINQUENT REAL ESTATE TAXES OF THE TOWN OF SEWARD, ALASKA, FOR 1913.

Petition for Adjustment and Order of Sale.

To the Honorable Judge of the Above-entitled Court:

Comes now your petitioner, Frank J. Cotter, and respectfully represents and shows:

That he is the duly elected and acting Town Clerk of the incorporated Town of Seward in the Third Judicial Division of the Territory of Alaska; that in accordance with Ordinance No. 14 of the said Town of Seward, Alaska (copy of said Ordinance herewith), the attached list of DELINQUENT REAL ESTATE TAXES OF THE TOWN OF SEWARD, ALASKA, 1913, covering thirteen pages, was prepared in duplicate by the Assessor of the town of Seward, Alaska, November 28, 1913, certified to by

---

*Page-number appearing at foot of page of original certified Record.

said Town Clerk, and said list together with notice was published in the "Seward Daily Gateway," a newspaper of general circulation, for a period of more than thirty days, per proof of publication herewith attached; that the cost of publishing said delinquent tax-roll and notice amounted to $367.50, being at the rate of 50 cents per line; that the said delinquent tax-rolls have been corrected to date, the original delinquent tax-roll being now in the possession of said Town Clerk; that the delinquent tax-roll herewith is a true, accurate and correct list and schedule of the real property at present time in the Town of Seward, Alaska, on which taxes for the year 1913 have not been paid and are delinquent.

WHEREFORE, your petitioner prays that an order of adjustment be made by your Honorable Court covering the costs entailed in advertising said property herein listed, together with court costs; and also that an Order of Sale be issued by your Honorable Court of all the real property herein listed on which taxes have not been paid and are delinquent, in order that the provisions of said Ordinance No. 14 may be carried out and complied with at as early a date as possible.

Dated Seward, Alaska, February 3d, 1914.

FRANK J. COTTER,

Town Clerk, Town of Seward, Alaska. **[3]**

United States of America,
Territory of Alaska,—ss.

Frank J. Cotter, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition; that he has read said petition,

knows the contents thereof, and that the same is true as he verily believes.

FRANK J. COTTER.

Subscribed and sworn to before me this 3d day of February, 1914.

[Seal] M. J. CONROY,

Notary Public for the Territory of Alaska, Residing at Seward, Alaska.

My commission expires March 13, 1916.

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Feb. 20, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy." [4]

S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Protest.

To the Mayor and Common Council of the Town of Seward, Alaska:

You will please take notice that the Alaska Northern Railway Company, a corporation organized and existing under the laws of the State of Washington and authorized to do business in the Territory of Alaska, and having property therein, will appear by

its attorney on the 18th day of February, 1914, or as soon thereafter as counsel can be heard, and object to any order of the Court approving the tax levy for the years 1912 and 1913, made by the municipality of Seward upon the following described property:

1. Lots 16, 17, 18, 19 and 20 in Block 16 of the Townsite of Seward.

2. All of the land lying and being south of the north line of Railway avenue and the south line of U. S. survey No. 726 south, according to the U. S. patent to Frank L. Ballaine and the map and plat of the Town of Seward, Territory of Alaska. Area seven acres.

3. One and forty one-hundredths acres which lies between the line of mean high tide on Resurrection bay and the east line of the right of way of the Alaska Central Railway and in front of U. S. Survey No. 726 S. and 726 N., F. L. Ballaine soldier's additional homestead location. 1 40–100 acres.

4. Twenty-eight one-hundredths acres, described as next above.

5. The land occupied and claimed exclusively as right of way for railroads by railroad companies and corporations, together with the buildings and all the substructures and superstructures supporting the same, situate within the Town of Seward, Alaska, —two miles.

6. The wharf known as Seward Dock within the Town of Seward, including the superstructures and piles driven into the ground for the purpose of supporting the same, for the following reasons, to wit:

1. That the Municipality of Seward had no power or authority to levy any tax or taxes upon railroad property of the Alaska Northern Railway Company; [5]

2. That the property attempted to be assessed is not sufficiently described to identify the same;

3. That the Act of the territorial legislature, entitled An Act relating to the assessment, levy and collection of general taxes for school and municipal purposes by municipal corporations, and declaring an emergency, is void;

4. That this Court has no jurisdiction to hear and determine the matter;

5. That the Alaska Northern Railway Company is exempt from municipal taxes for a period of five years by virtue of the act of Congress approved August 24th, 1912, entitled An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power Thereon, and for Other Purposes:

6. That the Alaska Northern Railway Company is further exempt from taxation by virtue of the special act of Congress, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes, approved June 30, 1906.

This defense will be made upon this notice and the delinquent tax-roll returned by the Municipality of Seward, and the affidavit of S. O. Morford, a copy of

which is hereto attached.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

By S. O. MORFORD,
Attorney and Agent.

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Feb. 20, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy."
[6]

S—38.

United States of America,
Territory of Alaska,—ss.

Affidavit of S. O. Morford.

S. O. Morford, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of Seward, territory of Alaska; that he is the attorney for, and the duly authorized agent of the Alaska Northern Railway Company upon whom service may be made in the territory of Alaska; that he has examined the delinquent tax-roll of the town of Seward, and knows the property therein described and assessed to the Alaska Northern Railway Company.

That the lands described as Lots 16, 17, 18, 19 and 20 in Block 16 of the Town of Seward, is the property of the Alaska Northern Railway Company, and occupied and used by it exclusively for an office building for the transaction of its business in the territory of Alaska, and for no other purpose.

That the tract of land described as one and forty one-hundredths acres which lies between the line of mean high tide on Resurrection bay and the east line of the right of way of the Alaska Central Railway and in front of U. S. survey No. 726 S. and 726 N., F. L. Ballaine soldier's additional homestead location, and also the land described as twenty-eight one-hundredths acres, described as next above, were granted to the Alaska Central Railway Company for terminal purposes, building approaches, docks, warehouses, et cetera, by special act of Congress approved June 30, 1906, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes"; that the Alaska Northern Railway Company is the successor to the Alaska Central Railway Company; that said tracts of land are an additional grant of right of way, and no patent has been issued therefor.

That the tract of land described as "The land occupied and claimed exclusively as right of way for railroads by railroad companies and corporations," is the right of way of the Alaska Northern Railway Company upon which its tracks, roundhouses and shops are located, [7] and the same is held by the Alaska Northern Railway Company as its right of way under the general act of Congress providing for the location and building of railroads in Alaska.

That the tract of land described as the wharf known as the Seward Dock within the Town of Seward including the superstructure and piles driven into the ground for the purpose of supporting the same, is part of the right of way, and is the initial

point of construction, and is held and used by the Alaska Northern Railway Company for railroad purposes.

That the tract of land described as land lying and being south of the north line of Railway avenue and the south line of U. S. survey No. 726 south, etc., is an impossible description. The lands referred to and owned by the Alaska Northern Railway Company lie between Railway avenue and north of the south line of U. S. survey No. 726 south, and between the east line of First avenue and the east line of U. S. survey No. 726 south, Frank L. Ballaine homestead, the same being lands held and claimed by the Alaska Northern Railway Company for the use of said company, for its tracks, warehouses, wharfs and approaches, and all of said property is necessary property for the proper conducting and operating of a railway from Seward to the head of Turnagain Arm in said territory.

That the Alaska Northern Railway Company has seventy-one miles of railroad constructed and operated, and the lands so included by the tax levy as shown by the delinquent tax-roll of the Town of Seward and assessed to the Alaska Northern Railway Company, are lands used exclusively for tracks, wharfs and approaches for conducting railway business from Seward to the interior of Alaska.

S. O. MORFORD.

Subscribed and sworn to before me this 20th day of February, A. D. 1914.

L. V. RAY,
Notary Public in and for the Territory of Alaska,
Residing at Seward.

My commission expires April 24, 1914.

Service accepted Feb. 20, 1914.

L. V. RAY,
City Attorney for Seward, Alaska.

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Feb. 20, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy."
[8]

S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

vs.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Stipulation of Facts.

To Hon. FRED M. BROWN, Judge of the District Court for the Third Judicial Division, Territory of Alaska.

In the above-entitled matter it is hereby stipulated by the Town of Seward, a municipal corporation, by its attorney, J. Lindley Green, Esq., and the Alaska Northern Railway Company, a corporation, protestant against the order of sale prayed for, represented by S. O. Morford, Esq., that an agreed statement of facts, as hereinafter set forth, shall be presented to the above-entitled court for an opinion of the law governing and controlling the controversy

set forth, and the judgment of the Court thereon requested; each and all the parties hereto reserving a right to prosecute a Writ of Error therefrom to the appellate court.

1. The Town of Seward is a municipal corporation, duly incorporated under the laws of Alaska applicable thereto, and is situated within the Third Judicial Division of the Territory of Alaska, within the jurisdiction of the above-entitled court.

2. The protestant, the Alaska Northern Railway Company, is a corporation duly organized and authorized to acquire, construct, maintain and operate railroads and wharves, in the territory of Alaska, and do a general transportation business.

3. The Alaska Northern Railway Company, the protestant, is the owner of all the property set forth in the delinquent tax list herein and assessed to the Alaska Northern Railroad Company.

4. That all of said property is railroad property and used for railroad purposes.

5. That the property in said list designated as Lots 16, 17, 18, 19 and 20 in block 16 of the Town of Seward are the lots upon which the railway office building is constructed, which building is [9] now used and has been used since its construction as the general headquarters and office building of the railway company for the transaction of the company's business, and is situate about 1,000 feet from the freight-sheds and railway track of the Alaska Northern Railway Co.

6. That the wharf is the terminal of the Alaska Northern railway, and its buildings were constructed

for, and are used as a freight and passenger station for the said railway company, and also for the use of the general public for passengers and freight entering Seward from foreign ports, and that wharfage charges have always been made and collected upon such freight.

7. That the Alaska Central Railway Company was organized and duly authorized to construct and operate railroads and wharves and do a general transportation business in the territory of Alaska.

8. That the Alaska Northern Railway Company, protestant herein, is the successor of the Alaska Central Railway Company.

9. That in the year 1909, by decree of the District Court for the territory of Alaska, Third Division, a judicial sale was had upon mortgage foreclosure of the property of the Alaska Central Railway Company, including that described in said tax-roll.

10. That in the year 1910, the Alaska Northern Railway Company was organized as successor to the Alaska Central Railway Company and acquired all its rights, property, franchises and privileges, and ever since 1910, when organized, has been and now is the owner and holder thereof.

11. That the Alaska Central Railway Company and its successor, the Alaska Northern Railway Company, have constructed and operated a railroad from Seward, Alaska, to Kern Creek, Alaska, a distance of seventy-one (71) miles.

12. That protestant, Alaska Northern Railway Company, claims the tax assessed, as described in

said delinquent tax-roll for the year 1913, of real property within the town of Seward, Alaska, an illegal and void assessment by reason of certain exemptions hereinafter set forth. [10]

13. It is agreed that in accordance with the ordinances of the Town of Seward, based upon and adapted from chapter 69 of the Session Laws of the territory of Alaska for the year 1913, entitled "An Act relating to the assessment, levy and collection of general taxes for school and municipal purposes by municipal corporations, and declaring *and* emergency," which law went into force and effect April 30, 1913, the delinquent tax-roll now under consideration was and is duly presented with its prayer for order of sale against the delinquent named.

14. That, for the purpose of this case, the assessment and levy of taxes upon real property situate within the incorporated limits of said Town of Seward for the year 1913, except as herein specifically set forth, was and is a valid and legal assessment and levy.

15. The protestant railway company claims its property to be exempt from taxation by reason of certain congressional enactments hereinbelow set forth and enumerated:

(a) By Act of June 6, 1900, 31 Statutes at Large 331, Compiled Laws of Alaska, sec. 2569, all railroads in Alaska are required to pay a tax of $100.00 per mile for each mile operated:

(b) An Act of Congress approved April 28, 1904, sec. 630 and sec. 631, Compiled Laws of Alaska, provides that all licenses collected within the limits of

the municipality shall be paid to the municipality for school and municipal purposes:

(c) Act of June 30, 1906, 34 Stat. L., 798, Compiled Laws of Alaska, clause Fifth.

> "Fifth, Said company" (Alaska Central Railway Company) "shall be exempt from license tax and tax on its railway and railway property during the period of construction and for five years thereafter: *Provided,* That the total period of exemption shall not exceed ten years from the time of the passage of this act."

(d) The Act of Mar. 2, 1909, 35 Stat. L., 683, Compiled Laws of Alaska, sec. 77, gives to the Alaska Central Railway Company a further period of three years in addition to that given in the Act described in clause (c).

(e) That portion of the Act creating a legislative body in Alaska, as set forth in section 416 of the Compiled Laws of Alaska, [11] reading: * * * "No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided,* That the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in

Alaska." * * * The Act being approved Aug. 24, 1912.

TOWN OF SEWARD, a Municipal Corporation.

By J. LINDLEY GREEN,
Attorney for Town of Seward.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

By S. O. MORFORD,
Attorney for Protestant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 3, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. **[12]**

In the District Court for the Territory of Alaska, Third Division.

S/38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

vs.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Opinion.

This is an application for adjustment and order of sale of real property for delinquent taxes, made by the Town of Seward, pursuant to the provisions of chapter 69 of the Territorial Laws of Alaska for the year 1913.

The Alaska Northern Railway Company, a corporation, has filed written objections to the making of an order by this Court approving the tax levy for the years 1912 and 1913, upon property owned by it within the corporate limits of the Municipality of Seward, assigning the following grounds of objection:

1. That the Municipality of Seward had no power or authority to levy any tax or taxes upon railroad property of the Alaska Northern Railway Company.
2. That the property attempted to be assessed is not sufficiently described to identify the same.
3. That the Act of the territorial legislature, entitled an Act relating to the assessment, levy and collection of general taxes for school and municipal purposes by municipal corporations, and declaring an emergency, is void.
4. That this Court has no jurisdiction to hear and determine the matter.
5. That the Alaska Northern Railway Company is exempt from municipal taxes for a period of five years by virtue of the Act of Congress approved August 24, 1912, entitled An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power thereon, and for Other Purposes.
6. That the Alaska Northern Railway Company is further exempt from taxation by virtue of the special act of Congress, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes, approved June 30, 1906. **[13]**

The only grounds urged by counsel for said Railway Company are the fifth and sixth, to wit:

a. That said Alaska Northern Railway Company is exempt from municipal taxes for the period of five years by virtue of the Act of Congress approved August 24, 1912, which was the Act creating a legislative assembly for the territory of Alaska. This Act, known as the Organic Act, contains the following provision, in Section 416, Compiled Laws of Alaska:

> "Provided that the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska."

The evident purpose and intent of this provision was to restrict or prohibit the territorial legislature of Alaska created by said Act from imposing any tax upon railways in Alaska for five years from August 24, 1912.

By the Act of Congress approved April 28, 1904, providing for the incorporation of towns in Alaska, the following powers were given to the Common Council of the towns or municipalities, section 9 (sec. 627, Comp. Laws of Alaska):

> "The said common council shall have and exercise the following powers:
>
> To assess, levy and collect a general tax for school and municipal purposes, not to exceed two per centum of the assessed valuation upon all real and personal property and to declare the

same a lien upon said property and to enforce the collection of such lien by foreclosure, levy, distress and sale."

This Act has never been repealed. Chapter 69 of the territorial laws of Alaska does not undertake to authorize or empower the levy or collection of any further or additional tax than that theretofore authorized by Congress, but merely provides for the manner of the enforcement and collection of the same.

Section 2569, Comp. Laws of Alaska, as amended June 6, 1900, provides for the payment of a license fee for carrying on certain lines of business and trade, and among other things, provides for the payment by railroads of $100 per annum on each mile operated. There is no more reason for believing that the Act relating to taxation [14] by municipalities, approved August 28, 1904, is repealed by implication by the said Organic Act approved August 24, 1912, than that the general act amended June 6, 1900, regarding the payment of $100 per mile of railroad operated as a license fee, should be so repealed by implication. By said Organic Act the Congress merely provides that it retains exclusive power for five years from August 24, 1912, to impose taxes upon railway property in Alaska. The tax here complained of is imposed or authorized by Congress and it would be contrary to every rule of statutory construction to read into this Organic Act something that is not contained therein, to wit, that Congress suspends the power of taxation theretofore granted to the municipality or suspends the license fee thereto-

fore imposed by Congress.

It seems to me clear that the purpose and intent of said provision of the Organic Act was merely to prohibit the territorial legislature from imposing a further or additional tax on railroads during said period of five years.

In the City of Rochester v. Rochester Ry. Co., 82 N. Y. 99, 70 L. R. A. 779, it is said—quoting Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1:

> "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the States has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended, except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." "See New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406, and Memphis Gaslight Co. v. Taxing District, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205."

(b) The said Alaska Northern Railway Company by its sixth ground of objection claims to be exempt from said taxation by virtue of a special Act of Congress entitled "An Act to extend the time for the completion of the Alaska Central Railway and for other purposes" approved June 30, 1906. This act provides: [15]

> "Section 5. Said company shall be exempt from license tax and tax on its railway and railway property during the period of construction and for five years thereafter; provided that the total period of exemption shall not exceed ten years from the time of the passage of this Act."

This special Act of Congress, however, was an act of privilege or exemption, personal to the Alaska Central Railway Company, not to its successors or assigns, which under the settled law, as determined by the Supreme Court of the United States, would not pass to this protestant, the Alaska Northern Railway Company.

In Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, it is said:

> "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a

corporation, made in the exercise of a power given by the statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize a new corporation, subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris.*

Morgan v. Louisiana, 93 U. S. 217.

Wilson v. Gaines, 103 U. S. 417.

Chesapeake & O. R. Co. v. Miller, 114 U. S. 176."

I am therefore of the opinion that the Alaska Northern Railway Company is lawfully subject to this tax and the objections of said Railway Company will be overruled and the order of sale made as prayed for.

Dated at Seward, Alaska, this 5th day of October, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 5, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [16]

In the District Court for the Territory of Alaska, Third Division.

Case No. S8—38.

Findings of Facts and Conclusion of Law.

IN THE MATTER OF THE DELINQUENT REAL ESTATE TAXES OF THE TOWN OF SEWARD, ALASKA, FOR 1913.

This case coming on to be heard and the Alaska Northern Railway, a corporation, having filed its protest, protesting against the Court making an order for the sale of real estate belonging to said railway company for delinquent taxes which have been assessed against said railway company by said Town of Seward for the year 1913, and the petitioner, the Town of Seward, having appeared by its attorney, L. V. Ray and J. *Lidnley* Green, and the protestant, Alaska Northern Railway Company, having appeared by its attorney, S. O. Morford, and the Court having heard all the evidence and argument by council, and being fully advised in the premises, finds the following facts:

1.

That the Town of Seward is a municipal corporation situated in the Third Division of the Territory of Alaska and is duly incorporated under the laws of Alaska applicable thereto, and has full power and authority to assess, levy and collect taxes upon the property situated within the corporate limits of the town.

2.

That the property belonging to the Alaska North-

ern Railway Company situated within the corporate limits of the Town of Seward is subject to taxation by said municipality. That the assessed valuation of the property belonging to the said Alaska Northern Railway Company was equally assessed by said municipality according to its valuation as required by law and in proportion to the assessed valuation of other property situated within the corporate limits of said municipality.

3.

That the assessment was legally made all the proceedings regular and according to law.

4.

That the said Alaska Northern Railway Company has not [17] paid the taxes for the year 1913, assessed against the following described real estate belonging to it, situated within the corporate limits assessed, by said Town of Seward for the year 1913, upon the following described property situated in the said Town of Seward, to wit:

All of Lots numbered, Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19) and Twenty (20) in Block Sixteen (16), all the land laying and being south of the north line of Railway Avenue and the south line of the United States Survey Number 726 South according to the United States patent to Frank L. Ballaine, and the plat of the Town of Seward, territory of Alaska, containing seven acres of land, one and forty one-hundredth acres which lies between the line of mean high tide on Resurrection Bay and the east line of the Alaska Central, now Alaska Northern Railway Company, and the front

of U. S. Survey Number 726 South and Number 726, North, of F. L. Ballaine's Soldier Additional Homestead Locations, twenty-eight one hundredths acres adjoining the above described tract on the North side thereof, the land occupied and claimed exclusively as right of way for Railroads by Railroad Companies, together with the buildings, sub-structures and super-structures supporting the same situated in the Town of Seward being two miles in length, the wharf known as the Seward Dock, including the superstructures and piles driven into the ground for the purpose of supporting the same. All of said property being situated within the corporate limits of the Town of Seward, Alaska.

5.

That all of the above-described property is situated within the corporate limits of the Town of Seward, Alaska, and subject to taxation by said Town of Seward. That said taxes were delinquent prior to the filing of the petition by said Town of Seward for an order for the sale of said property for the delinquent tax thereon; that all the proceedings and formalities have been had and performed which are required by law to entitle said Town of Seward to an order of this Court for the sale of said property as provided by law to satisfy the taxes assessed thereon. [18]

Conclusions of Law.

That from the facts found in this case the Court makes the following conclusions of law:

(1) That the levy of the taxes by the Town of Seward for the year 1913 was and is legal and valid.

(2) That the assessment and levy of taxes by the said Town of Seward for the year 1913 against the real estate, and all other property belonging to the Alaska Northern Railway Company, situated within the corporate limits of the Town of Seward, a legal and valid assessment and levy, and said property is subject to taxation by said town.

(3) That there is no law in the territory of Alaska which exempts the property of the Alaska Northern Railway Company or any part thereof from taxation by the said town of Seward.

(4) That the taxes for the year 1913 has not been paid on the property described in the foregoing *find* of facts for which petitioner prays for an order of this Court to sell; that said taxes were delinquent at the time the said Town of Seward filed its petition for an order of sale of said property. That said Town of Seward was entitled to said order at the time it filed its petition in this court for the sale of said property.

(5) That an order should be made by this Court for the sale of all the real estate described in the foregoing finding of facts as prayed for in the petition of the said Town of Seward or so much thereof as is necessary to be sold to satisfy the delinquent taxes assessed against it.

Done in open court this the 16th day of October, A. D. 1914.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. S–1, page No. 327.

[19]

In the District Court for the Territory of Alaska, Third Division.

Case No. S—38.

IN THE MATTER OF THE DELINQUENT REAL ESTATE TAXES OF THE TOWN OF SEWARD, ALASKA, FOR 1913.

Judgment.

This case coming on to be heard upon the petition the Town of Seward for an order of this Court to sell the real estate hereinbelow in this order described, for the reason that the taxes assessed against said real estate by the Town of Seward for the year 1913 is delinquent and unpaid. And the petitioner, the Town of Seward, Alaska, appearing by its attorneys, L. V. Ray and J. Lindley Green, and the Alaska Northern Railway Company, a corporation, appeared by its attorney, and protested against the Court making an order for the sale of the real estate belonging to the Alaska Northern Railway Company, situated in the corporate limits of the Town of Seward, Alaska, and the Court after hearing all the evidence and the argument of counsel for petitioner and protestant and examined the record in said case, is convinced that the order for the sale of the real estate hereinbelow described in this judgment should

be made, and the findings of fact and the conclusions of law having been heretofore made and entered by the Court in this case:

It is therefore ordered, adjudged and decreed by the Court, that the following described real estate which is situated within the corporate limits of the Town of Seward, Alaska, to wit:

All of lots numbered Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19) and Twenty (20), in Block Sixteen (16), all the land laying and being south of the north line of Railway Avenue and the south line of the United States Survey, Number 726 South, according to the United States patent to Frank L. Ballaine, and the plat of the Town of Seward, territory of Alaska, containing seven acres of land, one and forty one-hundredths acres which lies between the line of Mean high tide on Resurrection Bay and the east line of the Alaska Central, [20] now Alaska Northern Railway Company, and the front of U. S. Survey Number 726 South and Number 726 North of F. L. Ballaine's Soldier Additional Homestead Locations, twenty-eight one-hundredths acres adjoining the above-described tract on the north side thereof, the land occupied and claimed exclusively as right of way for railroads by railroad companies, together with the buildings, substructures and super-structures supporting the same situated in the Town of Seward, being two miles in length, the wharf known as the Seward Dock, including the super-structures and piles driven into the ground for the purpose of supporting the same. All of said property being situated

within the corporate limits of the Town of Seward, Alaska. Shall be sold at public auction by the clerk of said Town of Seward at a time and place within the corporate limits of said Town of Seward to be fixed by the common council of said town after giving notice of said sale by publishing a notice thereof, or posting notices thereof as required by law; to satisfy the delinquent taxes assessed against said real estate by the said Town of Seward, for the year 1913, and to satisfy all penalties and all costs incurred in the proceedings; that a corrected delinquent tax-roll corresponding to the real estate included in this order made up as prescribed by law, shall be attached to a copy of this order, which order shall be certified to by the clerk of this court.

Done in open court this the 16th day of October, A. D. 1914.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. S—1, page 337. [21]

Delinquent Tax-roll.

Alaska Northern Railway Company		
Block 16—Lot 16—Valuation..$	450.00	
Valuation Improvement	000.00	
Total Valuation.... $	450.00	
Amount of Taxes		2.70
Penalty		.14
Interest		.33
Advertisement		.50
Total		3.67
Alaska Northern Railway Company		
Block 16—Lot 17—Valuation..	450.00	
Valuation Improvements..	9750.00	
	10200.00	
Amount of Taxes		61.20
Penalty		3.06
Interest		7.55
Advertisement		.50
Total		71.81
Alaska Northern Railway Company		
Block 16—Lot 18—Valuation..	450.00	
Valuation Improvement	9750.00	
	10200.00	

Amount of Tax	61.20
Penalty	3.06
Interest	7.55
Advertisement	.50
Total	71.81

Alaska Northern Railway Company
Valuation
Block 16—Lot 19—Valuation.... 450.00
Valuation Improvement 9750.00

10200.00

Amount of Tax	61.20
Interest	7.55
Penalty	3.06
Advertisement	.50
Total	71.81

Alaska Northern Railway Company
Block 16—Lot 20—Valuation... 750.00
Valuation Improvement 97.50

Amount of Tax	63.00
Penalty	3.15
Interest	7.77
Total	73.92

[22]

Alaska Northern Railway Company—All of the land lying and being south of the north line of Railway Avenue and the south line of U. S. Survey No. 726 South, according to U. S. Patent to Frank L. Ballaine and the map and plat

of the Town of Seward, Territory of Alaska. Area seven acres.

Valuation.....24,500.00
Amount of Tax.....147.00
Penalty..... 7.35
Interest..... 18.13
Advertisement..... 5.00

Total.....177.48

Alaska Northern Railway Company—One and forty-one-hundredths acres which lies between the line of mean high tide on Resurrection Bay and the east line of the right of way of the Alaska Central Railway and in front of the U. S. Survey No. 726 S, and 726 N., F. L. Ballaine soldier's additional homestead location, 1 40/100 acres.

Valuation.....$4,800.00
Amount of Tax.....28.00
Penalty.....1.44
Interest..... 3.55
Advertisement..... 5.00
Total.....37.99

Alaska Northern Railway Company—Twenty-eight one-hundredths acres described as next above.

Valuation.....560.00
Amount of Tax.....3.36
Penalty..... .17
Interest..... .41
Advertisement..... 2.00
Total..... 5.94

Alaska Northern Railway Company—The land occupied and claimed exclusively as right of way for railroads by railroad companies and corporations, together with the buildings and all the sub-structures and super-structures supporting the same, situate within the Town of Seward, Alaska, two miles.

Valuation	30,000.00
Amount of Tax	180.00
Penalty	9.00
Interest	22.20
Advertisement	5.00
	216.20

[23]

Alaska Northern Railway Company—The wharf known as the Seward Dock within the Town of Seward, including the super-structure and piles driven into the ground for the purpose of supporting the same.

Valuation	10,000.00
Amount of Tax	60.00
Penalty	3.00
Interest	7.38
Advertisement	3.50
	73.88

Costs of suit to date.....9.75

Territory of Alaska
Third Division,—ss.

I, Carl Almy, clerk of the Town of Seward, Alaska, hereby certify that the foregoing is a true copy of the corrected delinquent tax-roll of said town for the year 1913, which has been corrected by me to correspond in all respects with the delinquent tax-roll as passed upon and allowed by the Court, to which has been added the costs of this suit, a copy of which said order of the Court is attached to this tax-roll.

IN WITNESS WHEREOF I have hereunto set my hand and the official seal of the Town of Seward, Alaska, this 21st day of November, A. D. 1914.

[Seal] CARL ALMY,
Clerk.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 27, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [24]

In the District Court for the Territory of Alaska, Third Division.

S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

vs.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Order Extending Time to [November 4, 1914, to] File Bill of Exceptions.

The Court having rendered its decision, this day, the protestant, Alaska Northern Railway Company, by its attorney, S. O. Morford, gives notice of appeal from the order therein rendered in favor of the Municipality of Seward and against protestant, Alaska Northern Railway Company.

IT IS ORDERED that said protestant, Alaska Northern Railway Company, have thirty days in which to prepare and files its bill of exceptions.

Oct. 5, 1914.

FRED M. BROWN,
Judge.

Entered Court Journal No. S–1, page 285.

Filed in the District Court, Territory of Alaska, Third Division. Oct. 5, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [25]

In the District Court for the Territory of Alaska, Third Division.

No. S. 38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Order [Extending Time to November 16, 1914, to File Bill of Exceptions].

On application of the Alaska Northern Railway Company, by its attorney, S. O. Morford, for an extension of time in which to serve and file its bill of exceptions in the above-entitled matter, and it appearing that the Municipality of Seward by its attorney, J. Lindley Green, has consented to an extension of time, and good cause appearing to the Court therefor, and it further appearing that the Court heretofore had entered an order giving the protestant, the Alaska Northern Railway Company, thirty days from the 7th day of October, 1914, in which to serve and file its bill of exceptions and that said time has not yet expired, it is ordered that the defendant Alaska Northern Railway Company have to and including the 16th day of November, 1914, in which to prepare, serve and file its bill of exceptions herein.

Dated 29 day of October, 1914.

FRED M. BROWN,
Judge.

[Endorsements]: Entered in Court Journal No. 8, page No. 363.

Filed in the District Court, Territory of Alaska, Third Division. Oct. 29, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [26]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Opinion [in Bill of Exceptions].

This cause coming on regularly to be heard the —— day of October, 1914, upon application of the Municipality of Seward for an order of sale for delinquent taxes for the year 1913, against the Alaska Northern Railway Company, a corporation, and the written protest of the Alaska Northern Railway Company, and a statement of facts signed and filed by the respective parties requesting the opinion of the Court on a question of law as to the right of the Municipality of Seward to levy a tax upon railways or railway property, the cause was submitted to the court on the record without further evidence, the Municipality of Seward being represented by L. V. Ray, Esq., and J. Lindley Green, Esq., and the Alaska Northern Railway Company being represented by S. O. Morford, Esq., the Court, after hearing the arguments of respective counsels and being fully advised in the premises, rendered its written decision in the case in words and figures as follows:

In the District Court for the Territory of Alaska, Third Division.

S/38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

vs.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Opinion.

This is an application for adjustment and order of sale of real property for delinquent taxes, made by the Town of Seward, pursuant to the provisions of Chapter 69 of the Teritorial Laws of Alaska for the year 1913. **[27]**

The Alaska Northern Railway Company, a corporation, has filed written objections to the making of an order by this Court approving the tax levy for the years 1912 and 1913, upon property owned by it within the corporate limits of the Municipality of Seward, assigning the following grounds of objections:

1. That the Municipality of Seward had no power or authority to levy any tax or taxes upon railroad property of the Alaska Northern Railway Company.
2. That the property attempted to be assessed is not sufficiently described to identify the same.

3. That the Act of the Territorial Legislature, entitled an Act relating to the assessment, levy and collection of general taxes for school and municipal purposes by municipal corporations, and declaring an emergency, is void.
4. That this Court has no jurisdiction to hear and determine the matter.
5. That the Alaska Northern Railway Company is exempt from municipal taxes for a period of five years by virtue of the Act of Congress approved August 24, 1912, entitled An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power Thereon, and for other Purposes.
6. That the Alaska Northern Railway Company is further exempt from taxation by virtue of the Special Act of Congress, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes, approved June 30, 1906.

The only grounds urged by counsel for said Railway Company are the fifth and sixth, to wit:

a. That said Alaska Northern Railway Company is exempt from municipal taxes for the period of five years by virtue of the Act of Congress, approved August 24, 1912, which was the Act creating a legislative assembly for the territory of Alaska. This Act, known as the Organic Act, contains the following provision, in Section 416, Compiled Laws of Alaska:

> "Provided that Congress reserves the ex clusive power for five years from the date of the

approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska."

The evident purpose and intent of this provision was to restrict or prohibit the territorial legislature of Alaska created by said Act from imposing any tax upon railways in Alaska for five years from August 24, 1912. **[28]**

By the Act of Congress approved April 28, 1904, providing for the incorporation of towns in Alaska, the following powers were given to the common council of the towns or municipalities, section 9 (Sec. 627, Comp. Laws of Alaska);

"The said common council shall have and exercise the following powers;

To assess, levy and collect a general tax for school and municipal purposes, not to exceed two per centum of the assessed valuation upon all real and personal property and to declare the same a lien upon said property and to enforce the collection of such lien by foreclosure, levy, distress and sale. 2

This Act has never been repealed. Chapter 69 of the territorial laws of Alaska does not undertake to authorize or empower the levy or collection of any further or additional tax than that theretofore authorized by Congress, but merely provides for the manner of the enforcement and collection of the same.

Section 2569, Comp. Laws of Alaska, as amended June 6, 1900, provides for the payment of a license fee for carrying on certain lines of business and

trade and among other things, provides for the payment by railroads of $100 per annum on each mile operated. There is no more reason for believing that the Act relating to taxation by municipalities, approved August 28, 1904, is repealed by implication by the said Organic Act, approved August 24, 1912, than that the General Act amended June 6, 1900, regarding the payment of $100 per mile of railroad operated, as a license fee, should be so repealed by implication. By said Organic Act the Congress merely provides that it retains exclusive power for five years from August 24, 1912, to impose taxes upon railway property in Alaska. The tax here complained of is imposed or authorized by Congress, and it would be contrary to every rule of statutory construction to read into this Organic Act something that is not contained therein, to wit, that Congress suspends the power of taxation theretofore granted to the municipality or suspends the license fee theretofore imposed by Congress.

It seems to me clear that the purpose and intent of said provision of the Organic Act was merely to prohibit the territorial [29] legislature from imposing a further or additional tax on railroads during said period of five years.

In the City of Rochester v. Rochester Ry. Co., 82 N. Y. 99, 70 L. R. A. 779, it is said, quoting Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1:

> "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the

legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended, except for very substantial reasons; and while, as we held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." "See New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep, 406, and Memphis Gaslight Co. v, Taxing District, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205."

(b) The said Alaska Northern Railway Company by its sixth ground of objection claims to be exempt from said taxation by virtue of a special Act of Congress entitled "An Act to extend the time for the completion of the Alaska Central Railway and for other purposes," approved June 30, 1906. This Act provides—

"Section 5. Said Company shall be exempt from license tax and tax on its railway and railway property during the period of construction and for five years thereafter; provided, that the

total period of exemption shall not exceed ten years from the time of the passage of this Act."

This special Act of Congress, however, was an act of privilege or exemption, personal to the Alaska Central Railway Company, not to its successors or assigns, which under the settled law, as determined by the Supreme Court of the United States would not pass to this protestant, the Alaska Northern Railway Company.

In Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, it is said:

> "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding by consolidation or by purchase under foreclosure, to the property and ordinary franchises **[30]** of the first grantee; that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by the statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to recognize a new corporation, subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and

express requirements of the grant construed *strictissimi juris.*

Morgan v. Louisiana, 93 U. S. 217.

Wilson v. Gaines, 103 U. S. 417.

Chesapeake & O. R. Co. v. Miller, 114 U. S. 176.

I am therefore of the opinion that the Alaska Northern Railway Company is lawfully subject to this tax and the objections of said Railway Company will be overruled and the order of sale made as prayed for.

Dated at Seward, Alaska, this 5th day of October, 1914.

FRED M. BROWN,
District Judge.

The protestant thereupon gave notice in open court of its exception to the ruling of the Court in favor of the Municipality of Seward and against the Alaska Northern Railway Company, and it was ordered by the Court that protestant, Alaska Northern Railway Company have thirty days in which to file its bill of exceptions, and thereafter, to wit, on the 29th day of October, 1914, on application of protestant for further time to prepare and file its bill of exceptions, the time was extended by order of the Court to and including the 16th day of November, 1914.

Exceptions.

The protestant Alaska Northern Railway Company makes the following exceptions to the rulings of the Court:

1. To the ruling of the Court that municipal corporations are authorized to levy taxes on railways or railway property in Alaska.
2. To the ruling of the Court denying that the Alaska Northern Railway Company is exempt from taxes for a period of five years from August 24, 1912, save and except taxes imposed by the Congress of the United States **[31]**
3. To the ruling of the Court holding that the Ninth paragraph of Section 627, Compiled Laws of Alaska, has not been repealed or superseded by the subsequent act of Congress approved August 24, 1912, entitled An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power Thereon, and for Other Purposes.
4. To the ruling of the Court that the Alaska Northern Railway Company is subject to taxation by the Municipality of Seward.
5. To the ruling of the Court that the Act of Congress approved August 24, 1912, entitled An Act to Create a Legislative Assembly in the Territory of Alaska, to Confer Legislative Power Thereon, and for Other Purposes, exempts railways and railway property from territorial taxes only and not from municipal taxes.
6. To the ruling of the Court that the Alaska Northern Railway Company, as successor of the Alaska Central Railway Company, is not exempt from taxation by virtue of the exemption extended to the Alaska Central Railway

Company by the Act of Congress approved June 30, 1906, 34 Stat. L. 798, Compiled Laws of Alaska, sec. 76; Paragraph Fifth, and the Act of March 2, 1909, 35 Stats. L. 683, Compiled Laws of Alaska, sec. 77.

7. To the ruling of the Court making an order of sale of protestant Alaska Northern Railway Company's property or any part thereof for delinquent taxes levied by the Municipality of Seward.

[Order Settling and Allowing Bill of Exceptions.]

And now, in furtherance of justice, and that right may be done the defendant, said defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done this 14th day of November, 1914.

FRED M. BROWN,
Judge.

[Endorsements]: Entered Court Journal No. 8, page No. 407.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [32]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Petition for Writ of Error.

And now comes the Alaska Northern Railway Company, a corporation, defendant herein, and says that on or about the 16th day of October, A. D. 1914, this Court entered judgment herein in favor of the plaintiff and against the defendant in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and for an order fixing the amount of security for the costs of said writ of error to be given by said defendant

thereon, and also fixing the amount of a separate bond to be given by it thereon in order to supersede the effect and enforcement of said judgment appealed from pending the hearing and determination of said writ of error.

S. O. MORFORD,
Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [33]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Order Allowing Writ of Error and Fixing Amount of Bond for Costs and Amount of Bond for Supersedeas on Writ of Error.

The Alaska Northern Railway Company, a corporation, the defendant, by its attorney, having this day filed in the above-named court its petition for allowance of a writ of error on its part from the judgment rendered and entered therein by said court on the 16th day of October, 1914, with its assignment

of errors upon which it will rely on said writ of error appended to said petition, and having presented its said petition and assignment of errors to the undersigned District Judge, presiding in said court, and moved thereon for an order allowing said writ of error and fixing the amount of security for the costs of said writ of error to be given by it thereon, and also fixing the amount of security for the costs and damages of said writ of error to be given by it thereon in order to operate as a supersedeas of said judgment pending the hearing and determination, and the undersigned having considered said petition and being fully advised on the premises, it is ordered as follows:

First, that the writ of error of said defendant prayed for in and by its petition be and the same is hereby allowed.

Secondly, that the amount of the bond to be given by said defendant, plaintiff in error, for the costs of said writ of error (but not to operate as a supersedeas), be and it hereby is fixed in the sum of $1,700.00, and that upon the filing of a bond for costs on said writ of error in said sum as prescribed by the statute in such case made and provided and approved by the undersigned, said writ of error shall become effective.

Thirdly, that the amount of a further bond thereafter to be given by said defendant, plaintiff in error, for the costs and damages [34] of said writ of error, in order to operate as a supersedeas of said judgment pending the hearing and determination of said writ of error, be, and it hereby is, fixed at the

sum of $250.00, and that upon the filing of such supersedeas bond in said sum, conditioned as prescribed by the statute in such case made and provided and approved by the undersigned, within the time prescribed by law for a supersedeas on writ of error, further proceedings upon said judgment shall be stayed until the determination of said writ of error and the filing of a mandate thereon in this court.

Done in open court this 18th day of February, A. D. 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Entered Court Jurnal No. 8, page No. 490.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 29, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [35]

In the District Court for the Territory of Alaska, Third Division.

No. S. 38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Assignment of Errors.

Comes now Alaska Northern Railway Company,

a corporation, defendant in the above-entitled action, and plaintiff in error herein, and makes and files the following assignment of errors on which it will rely in the prosecution of its Writ of Error in the above-entitled cause:

I.

The District Court erred in holding that Municipality of Seward has power to levy taxes upon railways and railway property in Alaska.

II.

The District Court erred in holding that the Municipality of Seward is authorized by law to levy taxes on the property of the Alaska Northern Railway Company.

III.

The District Court erred in holding the exemptions in the Act of Congress approved August 24, 1912, 37 Stat. L. 512, sec. 416, Compiled Laws of Alaska, that "No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided,* That the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska," apply to the Territorial Legislature only, and not to municipalities.

IV.

The District Court erred in holding that the Act

of Congress entitled An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes (sec. 416, Compiled Laws of Alaska), did not repeal or suspend for five [36] years that portion of the Act of April 28, 1904, authorizing municipalities to levy a tax not to exceed two per centum upon all real and personal property within the corporate limits and enforce the collection of the same.

V.

The District Court erred in holding that the tax imposed by the municipality of Seward for the year 1913 upon property of the Alaska Northern Railway Company is imposed by Act of Congress.

VI.

The District Court erred in holding that the exemption from taxation granted to the Alaska Central Railway Company was a personal exemption granted to the Alaska Central Railway Company, and did not inure to its property in the hands of its successors and assigns.

VII.

The District Court erred in holding that the Alaska Northern Railway Company is lawfully subject to this tax by the Municipality of Seward.

VIII.

That the District Court erred in its first finding of fact, in finding that the Town of Seward has full power and authority to levy and collect taxes upon the property within its corporate limits, and not finding that the property of the Alaska Northern Railway Company within corporate limits is exempt from

taxation by said Town of Seward.

IX.

That the District Court erred in its second finding of fact, in finding that the property of the Alaska Northern Railway Company situate within the corporate limits of the Town of Seward is subject to taxation by said municipality.

X.

That the District Court erred in its third finding of fact, in finding that the assessment was legally made and all the proceedings regular and according to law. [37]

XI.

That the District Court erred in its fifth finding of fact, in finding that the property of the Alaska Northern Railway Company is subject to taxation by the Town of Seward, and in further finding that the Town of Seward is entitled to an order of sale of said property to satisfy taxes assessed thereon.

XII.

That the District Court erred in making its first conclusion of law, that the levy of taxes by the Town of Seward for the year 1913 was and is legal and valid.

XIII.

That the District Court erred in making its second conclusion of law, that the assessment and levy of taxes by the Town of Seward against the property of the Alaska Northern Railway Company is a legal and valid assessment and levy.

XIV.

That the District Court erred in making its third

conclusion of law, that there is no law in the Territory of Alaska which exempts the property of the Alaska Northern Railway Company or any part thereof from taxation by the said Town of Seward.

XV.

That the District Court erred in making its fourth conclusion of law, that said Town of Seward was entitled to said order of sale at the time it filed its petition in this court for the sale of said property.

XVI.

That the District Court erred in making its fifth conclusion of law, that an order of sale should be made of the property described in the findings of fact to satisfy the delinquent taxes assessed against it.

XVII.

That the District Court erred in entering judgment and order of sale of the property of the Alaska Northern Railway Company. [38]

Wherefore, said defendant and plaintiff in error prays that said judgment of said District Court for the Territory of Alaska, Third Division, may be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, with directions for such further proceedings as may be proper.

S. O. MORFORD,

Attorney for Alaska Northern Railway Company, Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [39]

In the District Court for the Territory of Alaska, Third Division.

No. S.—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES.

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Northern Railway Company, defendant in the above-entitled action (by S. O. Morford, its attorney and duly authorized agent in said action) as principal, and Chas. E. Brown and Sidney Anderson, as sureties, are held and firmly bound unto the Municipality of Seward, a municipal corporation, plaintiff in said action, in the penal sum of Two Hundred Fifty & 00/100 Dollars ($250.00), lawful money of the United States of America, to be paid to said obligee; for which payment, well and truly to be made, we bind ourselves, successors, or assigns, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16th day of February 1915.

The condition of this obligation is such that, whereas, lately, at a session of the District Court for the Territory of Alaska, Third Division, holden at

Seward in said Division, in an action pending in said court between the above-named obligee, the Municipality of Seward, the plaintiff therein, and the above-named principal obligor, Alaska Northern Railway Company, a corporation, the defendant therein, a judgment and decree was made and entered by said court on the 16th day of October, 1914, in favor of said plaintiff and against said defendant, and said defendant is about to obtain a writ of error from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, the condition of this obligation is such, that if said principal obligor, defendant and plaintiff in error as aforesaid, shall prosecute its said writ of error to effect, and answer all costs if it fails [40] to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,
By S. O. MORFORD, (Seal)
Its Attorney and Authorized Agent.
CHAS. E. BROWN. (Seal)
SIDNEY ANDERSON. (Seal)

In presence of
CURTIS R. MORFORD.

United States of America,
Territory of Alaska,—ss.

Chas. E. Brown and Sidney Anderson, being first duly sworn, each for himself and not one for the other deposes and says: That he is one of the persons named as sureties in, and who executed the

foregoing bond on writ of error; that he is a resident within the Territory of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth double the amount specified in said bond as the penal sum thereof, in property within the said territory, over and above all just debts and liabilities, and exclusive of property exempt from execution.

CHAS. E. BROWN,
SIDNEY ANDERSON.

Subscribed and sworn to before me this 16 day of February, A. D. 1915.

[Seal] CURTIS R. MORFORD,
Notary Public in and for the Territory of Alaska,,
Residing at Seward.

My commission expires October 8, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By K. P. Geraghty, Deputy. [41]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS; That we, the Alaska Northern Railway Company, a corporation, defendant in the above-entitled action (by S. O. Morford, its attorneys and duly authorized agent in said action), as principal, and Chas. E. Brown and Sidney Anderson, as sureties, are held and firmly bound unto the Municipality of Seward, a municipal corporation, plaintiff in said action, in the penal sum of seventeen hundred & 00/100 Dollars ($1700), lawful money of the United States of America, to be paid to said obligee, for which payment, well and truly to be made, we bind ourselves, successors or assigns, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16 day of February, 1915.

The condition of this obligation is such that, whereas, lately, at a session of the District Court for the District of Alaska, Third Division, holden at Seward in said Third Division, in an action pending in said court between the above-named obligee, the Municipality of Seward, the plaintiff therein, and the above-named principal obligor, Alaska Northern Railway Company, a corporation, the defendant therein, a judgment and decree was made and entered by said court on the 16th day of October, 1914, in favor of said plaintiff and against said defendant, and said defendant has obtained a writ of error from said judgment and decree to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, and has given a bond as required by law for the costs of said writ of error, and has served upon the adverse party [42] a citation duly issued in pursuance of said writ of error, and desire now to give a further bond to supersede said judgment and stay the execution thereof until the determination of said writ of error, as provided by law—the amount of which supersedeas bond has been fixed, in and by the order made by said District Court in said action on the 16th day of February, 1915, allowing said writ of error, at $1700.00.

Now, therefore, the condition of this obligation is such that if said principal obligor, defendant below, plaintiff in error herein, shall prosecute its writ of error to effect and answer all damages and costs, if it fails to make its plea good, then this obligation to be void; otherwise to be and remain in full force and virtue.

ALASKA NORTHERN RAILWAY COMPANY.

By S. O. MORFORD, (Seal)
Its Attorney and Authorized Agent.
CHAS. E. BROWN. (Seal)
SIDNEY ANDERSON. (Seal)

In presence of
CURTIS R. MORFORD.

United States of America,
Territory of Alaska,—ss.

Chas. E. Brown and Sidney Anderson, being first duly sworn, each for himself deposes and says: That he is one of the persons named as sureties in,

and who executed the foregoing bond on writ of error, that he is a resident within the Territory of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the sum of Seventeen Hundred and 00/100 Dollars ($1700.00), the amount specified in said bond as the penal sum thereof, over and above all debts and liabilities, and exclusive of property exempt from execution.

CHAS. E. BROWN.
SIDNEY ANDERSON.

Subscribed and sworn to before me this 16 day of February, 1915.

[Seal] CURTIS R. MORFORD,
Notary Public for the Territory of Alaska, Residing at Seward Therein.

My Commission expires Oct. 8, 1915.

The foregoing supersedeas bond is hereby approved by me, as to form, sufficiency and sureties, this 18th day of February, 1915.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [43]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Writ of Error [Copy].

To the President of the United States of America, the Honorable Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the record and proceedings, also in the rendition of the judgment, of a plea which is in the said District Court, before you, between the Municipality of Seward, plaintiff, and Alaska Northern Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the Alaska Northern Railway Company, a corporation, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so

that you have the same at San Francisco, in said circuit on the 17 day April next, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of February, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the clerk's office at Valdez, Alaska, on the day and year last above written.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division. [44]

Writ of Error allowed this 18th day of February, 1915.

FRED M. BROWN,
District Judge.

[Endorsed]: Entered in Court Journal No. 8, page No. 489.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [45]

In the District Court for the Territory of Alaska. Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Order Extending Time in Which to File Records in the United States Circuit Court of Appeals, Ninth Circuit, on Writ of Error.

This matter coming on to be heard on motion of the defendant for an order extending the time in which to file the records in the above-entitled cause in the writ of error from the final judgment rendered in this court on the 16th day of October, 1914, to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the satisfaction of the Court that the time allowed in the writ of error is not sufficient time therefor;

It is therefore ordered, that the said Alaska Northern Railway Company, plaintiff in error herein, have to the 17th day of April, 1915, in which to have prepared the records in the above-entitled cause, on writ of error heretofore issued in said cause, and to file the same in the said United States Circuit Court of Appeals, for the Ninth Circuit.

Dated at Valdez, Alaska, this 18 day of February, 1915.

FRED M. BROWN,
District Judge.

[Endorsements]: Entered Court Journal No. 8, page No. 491.

Filed in the District Court for the Territory of Alaska, Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [46]

In the United States District Court for the Territory of Alaska, Third Division.

No. S—38.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

MUNICIPALITY OF SEWARD,

Defendant in Error.

Citation to Circuit Court of Appeals on Writ of Error [Copy].

United States of America,
Territory of Alaska,—ss.
To the Municipality of Seward, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, on the 17th day of April, 1915, pursuant to a writ of error filed in the clerk's office of the *District for*

the Territory of Alaska, Third Division, wherein Alaska Northern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 18th day of February, in the year of our Lord, one thousand nine hundred and fifteen, and of the Independence of the United States of America, the one hundred and thirty-ninth.

FRED M. BROWN,
District Judge Presiding in the District Court for the Teritory of Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy."
Entered Court Journal No. 8, page No. 491. [47]

In the District Court for the Territory of Alaska, Third Division.

S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus,

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Acknowledgment of Service of Papers on Writ of Error in the Above-entitled Cause.

I, the undersigned, J. Lindley Green, attorney of record for the plaintiff in the above-entitled cause, hereby accept service in the matter of writ of error, issued out of the above-entitled court, in said cause, on the 18th day of February, *191*, by receiving copies of the original files and records as follows, to wit:

Bill of Exceptions.

Order Allowing Bill of Exceptions.

Stipulation *in re* Transcript.

Petition for Writ of Error.

Order Allowing Writ of Error and Fixing Amount of Bond.

Assignment of Errors.

Bond for Costs on Appeal.

Supersedeas Bond.

Writ of Error.

Order Extending Time to File Writ of Error in Circuit Court of Appeals.

Citation.

Acknowledgment of Service of Papers on Writ of Error.

Praecipe.

Dated this 18th day of February, 1915.

J. LINDLEY GREEN,

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [48]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus,

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Stipulation [for Omission from Record of Part of Delinquent Property List, etc.].

It is hereby stipulated by and between the Municipality of Seward by its attorney, J. Lindley Green, Esq., and the Alaska Northern Railway Company, a corporation, by its attorney, S. O. Morford, Esq., that only so much of the delinquent property set forth in the petition for an order of sale as is described in the judgment and order of sale therein,

and no more, shall be included in the transcript of the record on writ of error, and the clerk of said court is hereby authorized to eliminate from said record on writ of error to the Circuit Court of Appeals all other property described in said delinquent tax-roll.

And it is hereby further stipulated that the copy of the municipal ordinance No. 14 be also eliminated by the clerk of said District Court from said record on writ of error to said Court of Appeals, and he is hereby authorized to eliminate the same.

J. LINDLEY GREEN,
Attorney for Municipality of Seward.
S. O. MORFORD,
Attorney for Alaska Northern Railway Company.

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy."
[49]

In the District Court for the Territory of Alaska, Third Division.

No. S—38.

IN THE MATTER OF THE MUNICIPALITY OF SEWARD FOR AN ORDER TO SELL REAL PROPERTY FOR DELINQUENT TAXES,

versus,

ALASKA NORTHERN RAILWAY COMPANY, a Corporation.

Praecipe for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a copy of the record in the above-entitled cause, as a return to the Writ of Error, heretofore sued out of said Circuit Court of Appeals, to review the judgment of said cause, which record shall consist of the following files and records, to wit:

Petition for Adjustment and Order of Sale.

Protest of Alaska Northern Railway Company and Affidavit Attached.

Stipulation of Facts.

Decision.

Findings of Fact and Conclusions of Law.

Judgment.

Order Granting Alaska Northern Railway Company Thirty Days to File Bill of Exceptions.

Order Extending Time to Serve and File Bill of Exceptions.

Bill of Exceptions and Order Allowing Bill of Exceptions.

Petition for Writ of Error.

Order Allowing Writ of Error and Fixing Amount of Bond.

Assignment of Errors.

Bond for Costs on Appeal.

Supersedeas Bond.

Writ of Error.

Order Extending Time to File Writ of Error in Circuit Court of Appeals.

Citation.

Acknowledgment of Service of Papers on Writ of Error.

Stipulation *in re* Transcript.

Praecipe.

S. O. MORFORD,
Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[50]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 51 pages, numbered from 1 to 51, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the plaintiff in error's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to Twenty-three and 55/100 Dollars ($23.55), was paid to me by S. O. Morford, Esq., attorney for the defendant and plaintiff in error herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 25th day of February, A. D. 1915.

[Seal] ARTHUR LANG,
Clerk, District Court, Territory of Alaska, Third Division.

By T. P. Geraghty,
Deputy. **[51]**

[Endorsed]: No. 2581. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Northern Railway Company, a Corporation, Plaintiff in Error, vs. Municipality of Seward, Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed March 6, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

7

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

S. O. MORFORD,
Attorney for Plaintiff in Error.
Seward, Alaska.

SEWARD GATEWAY PRINT

Filed
MAY 10 1915

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

S. O. MORFORD,
Attorney for Plaintiff in Error.
Seward, Alaska.

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

There is no controversy over the facts. It is admitted that the Town of Seward is a municipality existing under acts of Congress authorizing the incorporation of towns in the Territory of Alaska. (10)

It is admitted that the Municipality of Seward has power to levy and collect taxes upon all property within its corporate limits for general and municipal purposes, *except* such property as is exempt from taxation. (12)

It is admitted that the Alaska Northern Railway Company is a corporation authorized to construct and maintain railroads in the Territory of Alaska, and that it owns and operates a railroad from Seward, Alaska, for a distance of seventy-one miles, and that two miles of said railroad is within the corporate limits of the Municipalty of Seward. (11)

It is admitted that all the property in controversy is the property of the Alaska Northern Railway Company, and that it is necessary for railway purposes and used for railway purposes by said Company. (10) (Delinquent tax roll 28)

It is admitted that the Alaska Northern Railway Company, is the successor of the Alaska Central Railway Company, and acquired all its property, franchises and privileges. (11)

The contention of the Alaska Northern Railway Company, plaintiff in error, is that its property is exempt from taxation by the Municipality of Seward, by virtue of an Act of Congress approved May 14, 1898, entitled "An Act extending the homestead laws and providing for the right of way for railroads in the District of Alaska, and for other purposes," Sec. 47, page 96, Compiled Laws of Alaska, as enlarged by an Act of Congress approved June 30, 1906, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes," Sec. 76, page 106-107, Com-

piled Laws of Alaska, and the further Act of Congress approved March 2, 1909, Sec. 77, page 108, Compiled Laws of Alaska, further extending the time of exemption of the Alaska Central Railway Company's property from taxation.

It is admitted that, *if* said provisions inure to the Alaska Northern Railway Company, as successor to the Alaska Central Railway Company, said exemption from taxation is in full force and effect.

But it is contended by the Municipality of Seward, that the Acts of Congress exempting the Alaska Central Railway Company from taxation do not inure to the Alaska Northern Railway Company, its successor, for the reason that said exemption was personal to the Alaska Central Railway Company and did not pass to its successor,

The Alaska Northern Railway Company further claims exemption from taxation by the Municipality of Seward, by virtue of an Act of Congress, approved August 24, 1912, entitled, "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon and for other purposes." Chapter Three, pages 268-273, Compiled Laws of Alaska.

It is contended by the defendant in error that said Act only applies to and restricts the Territorial Legislature from levying any tax upon railway property in Alaska.

ASSIGNMENT OF ERRORS.

1. The Court erred in making and entering an order on the 16 th day of October, 1914, over-ruling defendant's objection to plaintiff's petition, and entering an order for the sale of defendant's property.

2. The Court erred in holding that the property of defendant was not exempt from taxation by the Municipality of Seward.

ARGUMENT

Only two questions are involved in this case.

1. Does the exemption from taxation granted to the Alaska Central Railway Company inure to the benefit of its successor, the Alaska Northern Railway Company?

2. Does the Act of Congress approved August 24, 1912, reserve for five years railways and railway property from taxation by municipalities in Alaska?

These two questions will be considered separately and in their order.

On June 30, 1906, (See Sec. 76, page 106-107, Compiled Laws of Alaska) there was approved an Act of Congress, entitled "An Act extending the time for the completion of the Alaska Central Railway, and for other purposes." This act provided, "That the time for compliance by the Alaska Central Railway Company with the provisions of Sections 4 and 5"*** of the act*** approved May 14, 1898, by locating and completing its railroad in Alaska is hereby extended

and the powers of said Company are enlarged as follows:

"First.****

"Fifth. Said Company shall be exempt from license tax and tax on its railway property during the period of contsruction and for five years thereafter; *provided* that the total period of exemption shall not exceed ten years from the time of the passage of this act.

"Sixth· Congress reserves the right to alter, amend or repeal this act****."

It will be noted that the act of June 30, 1906, describes this exemption as an enlargement of the power of the Alaska Central Railway Company. The act enumerated an extension of time for railway construction, as an enlargement of power granted to the Alaska Central Railway Company.

Outside of the extension of time, the enlargement of powers enumerated in the statute is of a property character. Thus the second of the powers conferred is a grant for terminal purposes on the Tanana River and the Yukon River, and for intermediate terminals, and for land at the Resurrection Bay terminus of the railroad.

The third of these enumerated enlarged powers granted to the Company is also a grant of property, being a grant of the reserved tract between the Scheffler and Revell homesteads on the north shore

of Resurrection Bay, which tract the Company is granted the privilege of purchasing at the rate of $1.25 an acre.

The fourth of these enumerated enlarged powers is also a property right, being the right to locate its right of way along the navigable waters of Alaska, and as near thereto as may be necessary for the safe, economical and efficient construction and operation of its line of railway.

The fifth of these enumerated enlarged powers is the exemption from license tax and tax on railway and railway property, which is thus placed among other property rights that constitute enlarged powers of the Company conferred by the act.

The act therefore explicitly characterizes this exemption from taxation not as an immunity, but as a power, and by declaring and enumerating it among other property rights granted to the Company as an enlarged power of the Company characterizes it as a property right. This characterization obviously is correct because one of the valuable appurtenances and incidents to this property is an exemption from the license tax and the tax on railway and railway property during the construction period.

If this implied characterization by Congress of this exemption as a property right is to govern, as it should, the construction of this act, this exemption

is not a mere personal privilege of immunity of the Alaska Central Railway Company, but is a property right as truly as any other property right of the Company, and therefore the title passed on foreclosure sale the same as any other property right of that Company.

The statute expressly describes this exemption as an enlarged power of the Alaska Central Railway Company. What is a power of a corporation? It is one of its franchises. The franchises of the Alaska Central Railway Company passed with its other property as fully and completely as any other property or any right or any power appurtenant to any of its property. In other words, by this act Congress enlarged the powers of the Company in respect to its property by increasing the amount of property it might obtain, and the rights, privileges and immunities it might possess in respect to its entire property. The enlarged powers were powers with respect to property. They consisted either of actual grants of land or easements or powers or advantages with respect to property. The full intent of Congress in passing this act can not be given to the act unless enlarged powers are construed as property rights. In view of the actual language of the statute therefore, the doctrine that exemptions from taxation are personal and die with the grantee has no application whatever in this case.

Looking at this act from another point of view, it

is perfectly clear that the exemption of taxation is appurtenant to and goes with the property. The wording of the exemption is: "Said Company shall be exempt from license tax and tax on its railway and railway property during the period of construction," etc. The characterization of this exemption in connection with other grants of the Company as enlarged powers of the Company show that the intent of Congress is that the exemption goes with the property. This is in harmony with the obvious purpose of the act. The object of the act was not to give a personal privilege to the Alaska Central Railway Company. It was to aid the enterprise that the Alaska Central Railway Company was furthering. If the Alaska Central Railway Company went out of the railway business and went into other business not connected with railroading, but subject to the license taxes of Alaska, it was not the intention of Congress that the railroad enterprise should immediately become subject to the burden of taxation, and these other taxable enterprises and businesses upon which the Alaska Central Railway Company might embark would be free from taxation.

Where an exemption is not personal but appurtenant to particular property the purchaser of that property at foreclosure sale purchases the benefit of the exemption.

Traverse Co. vs. St. P. R. Co.
73 Minn. 417;

Columbia Water Power Co. vs. Campbell,
75 S. C. 34;

Grand Canyon Ry. Co. vs. Treat,
95 Pac. 187;

New Jersey vs. Wilson,
7 Cranch 164;

Aaron vs. United States,
204 Fed. Rep, 943;

United States vs. Board of Com'rs of Osage Co. Okl. et al.
216 Fed. Rep. 883.

In considering the act as a whole, the circumstances under which it was passed, the object Congress had in view, the provisions of the act, and the way in which it was worded, manifestly it was intended that the exemption from taxation should be part of the property right and should possess all the ordinary incidents of property, namely: susceptibility of transfer and sale. It must be borne in mind that Congress reserved the right to alter or repeal the act. The powers and advantages conferred by the act could be withdrawn. The doctrine of strict construction that applies in general to exemptions from taxation does not apply in this case because the exemption is not permanent but temporary, not absolute, but purely at the will of Congress revocable by Congress at any time. It should therefore be construed liberally to carry out the purpose intended in the grant. This purpose of exempting railroad

property from license and other taxes has been expressed again and again by Congress in acts for the relief of railroads in Alaska.

Second claim of exemption.

The defendant in error bases its authority to levy and collect a tax or taxes for municipal purposes upon the Act of Congress approved April 28, 1904, Sec. 627, paragraph Ninth, page 318, Compiled Laws of Alaska:

"To assess, levy, and collect a general tax for school and municipal purposes, not to exceed two per centum of the assessed valuation, upon all real and personal property, and to declare the same a lien upon such property and to enforce the collection of such lien by foreclosure, levy, distress, and sale:****"

And, also, upon an Act of the Territorial legislature, approved April 30, 1913, Chap. 69, page 257, Session Laws of Alaska. Sec. 2 of said Act provides as follows:

"That the common councils are hereby empowered by general ordenance to provide for the annual assessment and levy of such taxes upon all real and personal property within the limits of their respective corporations not exempt therefrom by existing law and not to exceed two per cent. of the assessed value of such property.****"

Sec. 3 of the Act of Congress to create a legislative

assembly in the Territory of Alaska, approved August 24, 1912, (Sec. 410 Compiled Laws of Alaska), provides as follows:**** that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature:****"

Sec. 9 of said Act (Sec. 416, pp. 270, 271, Compiled Laws of Alaska), provides:

"****No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided,* That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska.****"

Sec. 630, page 321, Compiled Laws of Alaska, provides as follows:

"All license moneys collected by the clerk of the district court from any person for any business, trade, or occupation carried on within the limits of any incorporated town in the District of Alaska****, shall by said clerk be paid over to the treasurer of such town, to be used for school and municipal purposes within the town."

Sec. 2569, page 782, Compiled Laws of Alaska, provides that railroads shall pay one hundred dollars per mile per annum on each mile operated. This provision was in full force and effect at the time of the alleged assessment sought to be enforced in this action, and the same inured to the benefit of the Municipality of Seward, to the extent of the mileage operated within its corporate limits, unless relieved by the acts herein referred to.

This was the only tax on railway property in Alaska provided by Congress for the use and benefit of municipalities, and the same has since been repealed by Act of Congress, July 18, 1914, and all penalties for non-payment thereof remitted by said Act.

The contention of the defendant in error, that the exemption in the legislature assembly act of August 24, 1912, applies only to prevent the legislature from imposing taxes for territorial purposes is an impossible construction. The language of the Act wherein it provides:

"**** except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered by Congress or by the legislature ****" contemplates that the provisions of the general law in conflict with the provisions of this act are modified or repealed.

This limitation upon the power of the municipality is an amendment of the act of April 28, 1904 (Sec. 627, paragraph 9th, Compiled Laws of Alaska, page

318); and the above proviso in the Act August 24, 1912, is as much an exemption from the power of the town as of the Territory to levy any tax or taxes upon railways or railway property in Alaska, indeed, the proviso is more than an exemption, it is a general prohibition for five years from taxation of railways or railway property by any authority whatsoever, except Congress.

The Act of 1904, authorized a town to asses, levy and collect a tax not to exceed two per centum of the assessed valuation.

The Act approved August 24, 1912, prohibits the levying of any tax in excess of two per centum, and then by proviso declares that none of this tax shall be imposed upon railways or railway property in Alaska. It would be difficult to frame any more complete prohibition against taxing railways or railway property in Alaska for the next five years after the approval of the act, but after August 24, 1917, paragraph Ninth, Sec. 627, Compiled Laws of Alaska, now suspended, would again be in force.

This proviso is so entirely of the character of an independent enactment that even if the clause preceding the proviso had not referred to the taxing power of town, it would have the effect to repeal paragraph Ninth, Sec. 627, page 318, Compiled Laws of Alaska.

The rule is stated in "Cyc," Vol. 36, page 1163, as follows:

"Where from the language employed it is apparent that the Legislature intended a more comprehensive meaning it (the proviso) must be construed to enlarge the scope of the act or to assume the function of an independent enactment."

In reference to the practice of Congress in making independent enactments through the medium of provisos,

National Bank of Commerce vs. Cleveland et al.
156 Fed. Rep. 251

the Court said:

"The only ground for limiting the language that has been suggested is that the statutory provision is embodied in the general appropriation act providing for the expenses of the United States marshals and deputies during the year 1904. The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These provisos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress must be treated the same as if they were separate and independent enactments."

It will be noted that Congress is under no constitutional requirement to confine acts to one subject and express that subject in the title.

Whether or not the doctrine suggested is correct the clause immediately preceding the proviso contains these words:

"Nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year."

This fact makes the proviso directly applicable not merely to Territorial taxes but to town and municipal taxes, under any rule of statutory construction applicable to provisos.

Austin vs. United States
155 U. S. 417
32 Cyc. 743

United States vs. Bernays
158 Fed. Rep. 792

United States vs. Downing & Co.
146 Fed. Rep, 56

That provisos in acts of Congress are often intend to operate as independent acts and are so construed, see

Chesapeake Co. vs. Manning
186 U. S. 238
46 L. ed· 1144

Georgia vs. Smith
128 U. S. 174
32 L. ed. 377

United States vs. Whitridge
197 U. S. 135
49 L. ed. 696

It is respectfully submitted that the judgment of the lower court should be reversed and the cause remanded with instructions to dismiss Plaintiff's petition.

Respectfully submitted,
S. O. MORFORD,
Attorney for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

J. LINDLEY GREEN.
Counsel for Defendant in Error.
Seward, Alaska.

Filed
MAY 14 1915
F. D. Monckton

SEWARD GATEWAY PRINT

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO., A Corporation, Plaintiff in Error, vs. MUNICIPALITY OF SEWARD, Defendant in Error.	No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

J. LINDLEY GREEN.
Counsel for Defendant in Error.

Seward, Alaska.

In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

This action was brought by the town of Seward, Alaska, to foreclose its lien for taxes assessed against the real property belonging to the Alaska Northern Railway Company, said property being situated within the corporate limits of the town of Seward.

Plaintiff in error files a protest protesting against the court making the order of adjustment and sale of the property, assigning six grounds of

objection, but in the trial of the cause the first four objections were abandoned, the said plaintiff in error relying solely upon objections five and six, which are:

OBJECTION FIVE

"That the Alaska Northern Railway is exempt from municipal taxes for a period of five years by virtue of the act of Congress approved August 24, 1912, entitled An Act to create a Legislative Assembly in the Territory of Alaska to confer Legislative powers thereon, and for other purposes."

OBJECTION SIX

"That the Alaska Northern Railway Company is further exempt from taxation by virtue of the special act of Congress entitled An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes, approved June 30, 1906."

Plaintiff in error has assigned as error seven exceptions to the ruling of the Court, but upon examination I find that they are all embodied in objections five and six (supra) of the protest filed in the lower Court. Under assignment of error to this Court, it becomes apparent that there is but one proposition for the Court to decide: IS THE PROPERTY BELONGING TO THE ALASKA NORTHERN RAILWAY COMPANY EXEMPT FROM TAXATION BY MUNICIPALITIES?

Plaintiff in error raises two questions, namely:

No. 1 Did the act of Congress, approved August 24, 1912 entitled, An Act to create a Legislative Assembly in the Territory of Alaska to confer legislative power thereon and for other purposes, repeal the act of Congress approved April 28, 1904, which provided for the incorporating of towns and municipalities in Alaska, and defines their power of taxation?

No. 2 Does the Alaska Northern Railway Company, by virtue of its purchase of the Railway and Railway Property formerly owned by the Alaska Central Railroad, succeed to the exemption from taxation granted by Congress to the said Alaska Central Railway Company.

ARGUMENT.

I will discuss the two propositions in their order.

No. 1.

It is claimed by plaintiff in error that the property taxed is exempt under the act of Congress approved August 24, 1912, which is entitled:

> "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative powers thereon, and for other purposes, in Alaska."

This act is generally spoken of as the ORGANIC ACT and will be hereinafter referred to as the Organic Act.

That part of the act upon which plaintiff in error relies is that part of section Nine of the act which reads:

> "No tax shall be levied for Territorial purposes in excess of one per centum of the property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of the property within the town, in any one year: Provided, that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon Railways and Railway property in Alaska."

Plaintiff in error contends that the last clause above quoted, "That the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon Railway or Railway property in Alaska" is as binding upon the Common Councils of the Municipalities of Alaska as it is upon the Territorial Legislature thereof.

On the contrary it is the contention of the defendant in error that the said reservation does not apply to the Common Council of the Municipalities, but applies exclusively to the Legislature.

It must be borne in mind that at the time this legislation was passed, Congress was dealing ex-

clusively with the problems of creating a Legislative Assembly for Alaska and defining its powers.

It must be borne in mind that Congress, eight years previous to the passage of the Organic Act, passed the act providing for the incorporating of Municipalities in Alaska, defining their powers and the powers of the Common Councils in such municipalities. This act which was approved April 28, 1904, made special provisions for the taxation of property within the corporate limits of the Municipality, stating just what property should be exempt from taxation.

It must also be borne in mind that Congress in passing the Organic Act nowhere restricted or encroached upon the rights and power previously granted the Municipalities, unless it had done so in this particular clause, dealing with the exemption of Railroads from taxation in Alaska. It is true that immediately preceding the reservation of railways from taxation, there is a clause which provides: "Nor shall any incorporated town or Municipality levy any tax for any purpose in excess of two per centum of the assesed valuation of the property, within the town, in any one year," but it will be observed that the rate of taxation fixed by Congress in the Act of April 28, 1904, creating Municipalities was limited to two per centum of the assessed valuation of the property situated within the corporate limits thereof, it is therefore clear that Congress in

using that language had no intention of restricting any right previously granted the municipality, but to reserve from the legislative body, it was then creating, the authority it would otherwise have had to extend the taxing power of municipalities. Any other construction would render the clause meaningless.

It must also be borne in mind that the law approved April 28th 1904, which enables Municipalities in Alaska to incorporate, is an Act of Congress and is of the same dignity as is the Organic Act. The first acts deals with a legislative assembly for the municipalities of Alaska, defining what property shall be exempt from taxation, the latter act (Organic Act) is dealing with the powers of the Legislature, it was then creating, and has reserved from said legislature the authority of taxing Railway and Railway property.

The Municipalities of Alaska do not look to the Legislature for authority to levy and assess a municipal tax. If the municipalities of Alaska were creatures of the Territorial Legislature an entirely different proposition would be presented; The elementary principle that a creation cannot be greater than its creator would then apply, and the fact that the legislature was prohibited from taxing Railways and Railway property, would also disqualify the legislature from imparting that power to a municipality of its creation, but defendant in error is not in that position, the town of Seward was in exist-

ence with all its powers of taxation, before the Territorial legislature was created. The town was incorporated and derives its power of taxation from the act of Congress approved April 28, 1904, no part of which has the legislature repealed. The only part of the act which concerns this case is that part of Section 627 of the Compiled Laws of Alaska, which reads:

> "The said Common Council shall have and exercise the following powers:
>
> NINTH To assess and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation, upon all real and personal property, and declare the same a lien upon such property and enforce the collection of such lien, by forclosure, levy, distraint, and sale: Providing, however, that all property belonging to the municipality used exclusively for religious, educational and charitable purposes, and the household furniture of the head of a family or a householder, not exceeding two hundred dollars in value, shall be exempt from such taxation: Provided further, that the law exempting certain property from levy and sale on execution shall not apply to said taxes or the collection of the same."

In the opinion rendered in the lower court, the Honorable Judge, after quoting that part of the act

of Congress, approved April 28, 1904, granting the power of taxation to municipalities, made the following comment thereon:

> "This act has never been repealed. Chapter 69 of the Territorial laws of Alaska does not undertake to authorize or empower the levy or collection of any further or additional tax than that theretofore authorized by Congress, but merely provides for the manner of enforcement and collection of the same." (page 38 of transcript).

It is very evident that the exemption from taxation in the law above quoted does not extend to Railways or Railway property, but it is claimed by plantiff in error that the word, "exclusive" as used in the clause in the Organic Act indicates that it was the intent of Congress to restrain the Common Council of Municipalities, as well as the Territorial Legislature, from taxing Railways and Railway property. This contention is not sustained without placing an unwarranted construction on that clause. As previously stated, Congress was creating a territorial legislature and had no thought in the use of the word "exclusive" other than to wholly exclude from said legislature all power of taxing Railways and Railway property. The fact that no reference is made to the previous act, granting to the Common Council of Municipalities the power of taxation is very persuasive evidence that Congress had no thought of taking from the Common Council of Municipalities any powers previously granted.

The use of the word "reserve" indicates that it was not the intent of Congress to take away powers already granted, but to reserve from the legislature, it was then creating, certain rights out of the powers it was then granting.

It is the policy of the courts to sustain the taxing power of the state in every instance where it can be done by a reasonable interpretation of the statute, and this rule applies to municipalities. It will never be presumed that it was the intent of Congress to abridge the taxing power of the municipality when once granted unless such intent is manifest in clear and unmistaken terms:

Yazoo & M. Valley R. Co. v Adams, 180 U. S. 1; City of Rochester v Rochester R. Co. 82 N. Y. 99; 70 L. R. A. 779;

Maine Central R. Co., v State of Maine 96 U. S. 99; 24 Law. Edition 836.

The principle of law seems to be that a statute abridging the right of taxation should receive the narrowest construction which will carry out the intent of the legislature:

Dauphin, etc R. Co., v Kennerly 74 Ala. 589; 37 Cyc. 726;

State vs. Great Northern Ry. Co., 106 Minn 303; 119 N. W. 202;

State of Missouri v Kenebeck and Western R. Co. 6 L. R. A. 222;

Wilson v Gains 103 U. S. 417;
Morgan v Louisiana 93 U· S. 417.

In the case of the Yazoo & M. V. R· Co. v Adams (supra) Justice Brown in delivering the opinion of the court said:

> "Public policy in almost all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational, and municipal purposes, but this list should not be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contracts should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that the courts are astute to seize upon evidence tending to show either, that such exemptions were not orginally intended, or that they have become inoperative by change in the original constitution of the Companies."

The above is quoted with approval by the N. Y. Courts in the case of City of Rochester v Rochester Ry. Co. 82 N. Y. 99, 70 LRA 779. It was also quoted with approval by the lower court in its opinion rendered in this case, the court prefacing the quotation with these words:

> "It seems to me clear that the purpose and intent of said provision of the Organic Act was merely to prohibit the Territorial Legislature from imposing a further or additional tax on Railroads during said period of five years" (page 39 of Records).

In the case of State of Missouri v Kenebeck & Western R. Co. supra, the court said:

> "It must be kept in mind that exemptions from taxation will not be recognized unless granted in terms too plain to be mistaken."

In view of the rule of strict construction, against all laws tending to curtail or abridge the power of taxation, so tenaciously adhered to by the courts resolving all doubts in favor of the taxing power, it certainly seems that the reservation in the Organic Act can apply only to the Territorial Legislature and that Congress had no thought of repealing or superseding any of the powers it had previously granted to the common councils of municipalities to assess, levy and collect a general tax upon all railway property situated within the coporate limits of the municipality.

No. 2.

Is the exemption from taxation of its Railway and Railway property granted by Congress to the Alaska Central Ry. Co· an appurtenance or franchise which follows the property when transferred

to a third party or was it a personal privilege to the Alaska Central Railway Company.

In order that the Court may get a clear idea of the situation, I will make a brief statement of the facts concerning the history of the Alaska Northern Railway Company, plaintiff in error herein.

The Alaska Central Railway Co. was a foreign corporation incorporated under the laws of the state of Washington. Prior to the year of 1905 said company commenced the construction of a railway from Seward, on Resurrection Bay, in Alaska, the proposed terminal to be somewhere on the Tanana River in Alaska.

An Act of Congress approved June 30, 1906, among other provisions granted to said Alaska Central Railway Co. immunity from taxation on its Railway and Railway property.

During the year 1907 or 1908 said Company became involved in financial difficulties and on October 19, 1909 the property of said Company was sold at marshal's sale to F. G. Jemmett. A short time thereafter the Alaska Northern Railway Co. was incorporated under the laws of the State of Washington to take over the property and said Jemmett transferred the property to said Alaska Northern Railway Co.

Plaintiff in error contends that the immunity from taxation granted by Congress to the Alaska

Central Railway Co. was in the nature of an appurtenance or franchise and passed by transfer from the Alaska Central Railway Co. to Jemmett and from him to the Alaska Northern Railway Co.

Defendant in error contends that the immunity was personal to the Alaska Central Railway Co. and was incapable of being transferred.

It is a well settled principle of law that immunity from taxation granted to a person or corporation is a personal right and not transferable and it is equally as well settled that where the exemption is placed on certain property, describing it without reference to the ownership, that in absence of a substantial consideration therefor flowing to the state, or clear and unmistakable language showing that it was the intent of Congress that the exemption should follow the property into the hands of a third party, such exemption is a personal right to the owner of the property at the time the exemption was granted and is not an appurtenance or franchise capable of being transferred:

Shields v Ohio 95 U· S. 319;
Maine C. R. Co. v Maine 96 U. S.;
Norfolk & W. R. Co. v Pendleton 159 U. S. 667;
Yazoo & M. Valley R. Co. v Adams (supra) 180 U. S. 1;
Morgan v Louisiana (supra) 93 U. S. 217;
Chespeke & Ohio R. Co. v Miller 114 U· S. 176;

Tucker v Ferguson 22 Wall. 527;
City of Rochester Ry. Co. 182 N. Y. 99;
Wilson v Gaines (supra) 103 U. S. 417;

In the case of Wilson v Gaines (supra) Chief Justice Waite in delivering the opinion of the court quoted with approval from the opinion of the court in Morgan v. Louisiana (supra) the following:

> "In Morgan v. Louisiana 93 U. S. 217 we distinctly held that immunity fom taxation was a personal privilege and not transferable except with the consent or under the authority of the legislature which granted the exemption, or some succeeding legislature, and that such exemption does not necessarily attach to or run with the property after it passed from the owner in whose favor the exemption was granted."

In the case of Morgan v Gaines (supra) the exemption was on the property, the language being that the property should be exempt, while in this case the exemption was to the Alaska Central Railway Co. The Act of Congress, approved June 30, 1906, granting the said exemption, is entitled "An Act to Extend the Time for the Completion of the Alaska Central Railway, and for other puropses." The only part of this Act that concerns this case is paragraph five thereof which reads as follows:

> "Fifth: Said Company (referring to Alaska Central Ry. Co.) shall be exempt from license

> tax, and tax on its railway and railway property during the period of construction and for five years thereafter; Providing, that the total period of exemption shall not exceed ten years from the time of the passage of this act."

Could more apt language have been selected to indicate that the exemption was personal and could not extend to property not owned by the Alaska Central Ry· Co. than the words "said Company shall be exempt from license tax and tax on its railway and railway property?"

The wording of the act confines the exemption to the Alaska Central Ry. Co. The act did not exempt the property but simply exempted the company from paying a tax thereon. In other words the language of the act prohibited the municipality from assessing and levying a tax on the railway so long as it was the property of the Alaska Central Ry. Co. and no longer.

Had the act read:

The Alaska Central Railway and Railway property shall be exempt, the contention of the plaintiff in error that the exemption would follow the property, would be more plausible; but under the decisions of the courts above cited the contention of the plaintiff in error would not then be tenable. But the act reading as it does, it would be just as plausible to contend that because Congress

has exempted the household property of the head of a family and householder from taxation by municipalities in Alaska, that as the property becomes exempt in the hands of the householder, the exemption followed the property and was still exempt from taxation when sold to the second hand dealer. In fact in the case of the household property the contention of the second hand dealer would be more plausible, for in his case the law reads that the property shall be exempt from taxation, while in the case of the Alaska Central Ry. Co. the exemption was to the Company and not to the property.

It will also be observed by a careful examination of the act of Congress approved June 30, 1906, above referred to, that it contains many other privileges and benefits granted the Railway Co. without any consideration whatever flowing from the Company to the United States or to the Territory of Alaska in return therefor. There being no consideration for the exemption from taxation and the exemption being personal to the Alaska Central Railway Co., the right was incapable of being tansferred.

In the case of Berryman, et al., v Board of Trustees of Whitman College 222 U. S. 334, the court, in discussing the question of exemptions from taxation and whether such exemptions when granted were transferable, said:

"In other words the question was whether the transmission of the privileges of the corporation to

another embraced the privilege resulting from a contract exemption from taxation. It was held that it did not, upon the theory that a contract exemption from taxation was so exceptional in its nature that the right to transmit it was not embraced in the general authority to transmit privileges, and therefore the power to transfer must be expressly and specifically conferred."

The above being quoted with approval by the Supreme Court of the United States and being the latest expression of the court on that point is certainly decisive, and there being no reference to transferring the exemption from taxation in the act granting the exemption to the Alaska Central Ry. Co., it would certainly seem that the Alaska Northern Ry. Co will have to pay its taxes.

Respectfully submitted,

J. LINDLEY GREEN.

Counsel for Defendant in Error.

No. 2582

United States

Circuit Court of Appeals

For the Ninth Circuit.

CANADIAN PACIFIC RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed
APR 6 - 1915
F. D. Monckton,
Clerk

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States, in and for the Ninth Circuit, and Northern District of California.

JOHN WIELAND, Doing Business Under the Firm Name and Style of "WIELAND BROS.,"
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Complaint.

Plaintiff in the above-entitled action complains of the defendant herein as follows:

I.

That at all the times in this complaint mentioned the plaintiff was and now is a citizen and resident of the United States and of the State of California, and doing business under the firm name and style of "Wieland Bros.," importers and wholesale provision dealers, in the City and County of San Francisco, in said Northern District of California.

II.

That at all the times hereinafter mentioned the defendant was and now is a corporation duly organized under the laws of a foreign country, to wit, the Dominion of Canada, and having its principal place of business in said Canada, and having a place of business in said City and County of San Francisco, and that defendant was and now is a common carrier of goods for hire.

III.

That at and before the times hereinafter mentioned defendant had established an agency at the City of Antwerp, in the Kingdom of Belgium, and also an agency in the City and County of San Francisco aforementioned. That, before the times hereinafter mentioned, plaintiff had entered into and made an agreement [1*] with defendant, through the recognized agent of said defendant in San Francisco, by the terms of which agreement said defendant agreed to receive and ship, at the said City of Antwerp, all the goods offered to defendant for carriage by said plaintiff or on behalf of said plaintiff by European consignors, at a rate of freight agreed upon, and to safely carry the same from the said City of Antwerp in the Kingdom of Belgium, to the said City of San Francisco in the State of California, and to there deliver the same to the plaintiff.

IV.

Plaintiff is informed and believes, and on such information and belief alleges the facts to be that thereafter and during the life of said agreement, and within the terms thereof, and on or about the 20th day of May, A. D. 1901, at the said City of Antwerp, defendant carrier, by its authorized agent in said city, notified and requested certain consignors acting on behalf of said plaintiff, to wit: the firm of Oswald Roth, of Uster, Switzerland, to deliver or cause to be delivered to defendant or its said authorized agent in Antwerp, on or about the 3d day of June, A. D. 1901, certain merchandise of great value previously

*Page-number appearing at foot of page of original certified Record.

ordered by plaintiff from said consignors and belonging and to be consigned to said plaintiff, to wit: thirty-five (35) tubs of cheese of the value of seventeen thousand francs, more or less, at the place of consignment, to be by said defendant as carrier taken care of, and to be by defendants shipped on board the SS. "Sardinian Prince" which was to sail on the 5th day of June, A. D. 1901, and to be by defendants safely and securely carried and conveyed from said City of Antwerp to said City of San Francisco, to be there delivered to plaintiff, for said certain rate or reward paid or to be paid therefor to defendant as previously agreed for the care, carriage, conveyance and final delivery thereof. [2] That, in consideration of such delivery in accordance with defendant's request, defendant carrier undertook, and to the said plaintiff and the said Roth, acting on behalf of plaintiff, then and there faithfully promised and agreed as such carrier to take care of and to ship on board the SS. "Sardinian Prince" which was to sail on the 5th day of June, A. D. 1901, and to safely and securely keep, carry and convey the said goods from the said City of Antwerp to said City of San Francisco, and to there safely deliver the same to this plaintiff. That said plaintiff, by his said consignors, relying on said promise and undertaking of defendant, thereafter, to wit: on or about the 3d day of June, A. D. 1901, at the said City of Antwerp, did deliver or cause to be delivered to the said defendant or its duly authorized agent, the said goods, to be by defendant safely and securely taken care of, kept, carried, conveyed and delivered as aforesaid, and that defendant, by its said agent, then and there re-

ceived and accepted the said goods for the purpose aforementioned and for immediate shipment.

V.

That the said defendant, not regarding its said promise and undertaking, but in violation thereof, has not safely and securely as carrier taken care of, kept, carried, conveyed or delivered the said goods or any part thereof, but on the contrary, has wholly neglected and omitted so to do, and by and through said default of said defendant the said goods and every part thereof, became and were, wholly lost to said plaintiff, to his damage in the sum of six thousand two hundred dollars ($6,200). Yet the said defendant, though often requested, has never paid said sum, nor any part thereof, but has refused and yet refuses so to do. [3]

WHEREFORE, plaintiff demands judgment against defendant for the sum of six thousand two hundred dollars ($6,200) with legal interest thereon from the time when said goods should have been delivered to said plaintiff, and for costs of suit.

LOUIS T. HENGSTLER,
Attorney for Plaintiff.
MILTON ANDROS,
Of Counsel. [4]

State of California,
City and County of San Francisco,—ss.

Christian Schulz, being duly sworn, deposes and says: That at all the times in said complaint mentioned he was and still is the manager of the firm of "Wieland Bros." and agent of the plaintiff doing business under the firm name of "Wieland Bros."

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and, as to those matters, that he believes it to be true. That he resides in the City and County of San Francisco, and makes this affidavit on behalf of said plaintiff for the reason that said plaintiff is absent from the said City and County of San Francisco and the State of California.

CHRISTIAN SCHULZ.

Subscribed and sworn to before me this ninth day of June, 1902.

[Seal] HARRY J. LASK,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 9, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk. [5]

In the Circuit Court of the United States, in and for the Ninth Circuit, and Northern District of California.

JOHN WIELAND, Doing Business Under the Firm Name and Style of "WIELAND BROS.,"
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Answer of Defendant.

Now comes said defendant, and answers the com-

plaint filed by plaintiff in the above-entitled action as follows:

Defendant admits that at and before the times mentioned in said complaint, it had established an agency for certain purposes at the City of Antwerp, in the Kingdom of Belgium.

And defendant avers that it is informed, verily believes and accordingly upon its information and belief, alleges that at all times aforesaid, plaintiff was fully cognizant of the purposes of the said agency of defendant at said City of Antwerp, and of the scope and limit of the authority of the agent in charge of said agency.

And defendant admits that at the times aforesaid, it had established a district freight and passenger agency in the City and County of San Francisco, State of California.

Defendant denies that before the times aforesaid, entered into or made any agreement with defendant through the recognized agent of defendant in San Francisco, or otherwise, by the terms of which said agreement, said defendant agreed to receive or ship at the said City of Antwerp, goods offered to defendant for carriage by said plaintiff or on behalf of said plaintiff by European consignors at a rate of freight agreed upon or to safely carry the same from said City of Antwerp, in the Kingdom of [6] Belgium to the said City of San Francisco, in the State of California, or to there deliver the same to the plaintiff, or any other agreement whatsoever, or any transactions except as hereinafter specified.

Defendant avers that heretofore from time to time it made various offers to plaintiff, to the effect that

it would receive shipments of freight for plaintiff at Antwerp, Belgium, and would cause the same to be carried and delivered to plaintiff at San Francisco, at different special rates of freight fixed and quoted to plaintiff at such times and occasions, but that each and every one of said offers was made to and received by plaintiff in every instance subject to certain express conditions, provisions, exemptions and stipulations, one of which was to the effect that no such shipment of freight should, could or would be delivered to or received for transportation as aforesaid, except only if and when the same was placed upon landing places in the said City of Antwerp alongside of ships to be designated by defendant, which ships were then and there ready to take such shipments of freight on board and not otherwise, and another of which was to the effect that defendant should not be liable for any damage to or destruction of such shipments of freight caused by fire at sea or on shore at any time or in any place, it being the fact well known, understood and agreed upon by the parties to this action at all the times aforesaid, that defendant had no control over the management or movements of such ships, but that the same belonged to and were under the control of other persons.

Defendant denies that during the life of any agreement, or within any term thereof, or on or about the 20th [7] day of May, 1901, at the said City of Antwerp, or at any other time or place, defendant by its authorized agent in said City or otherwise, notified or requested certain consignors acting on behalf of said plaintiff, to wit: the firm of Oswald Roth of

Uster, Switzerland, or any other person or persons, to deliver or cause to be delivered to defendant or its said authorized agent in Antwerp on or about the 3d day of June, 1901, certain merchandise, to wit: the 35 tubs of cheese specified and described in plaintiff's complaint or any part of said merchandise belonging to or to be consigned to said plaintiff to be by defendant as carrier or otherwise, taken care of or shipped or carried or delivered in any manner or way whatsoever, or gave to said or any such consignors any other notice with reference to such merchandise except only as hereinafter stated and not otherwise.

Defendant avers that during the month of May, 1901, it caused the firm of Oswald Roth of Uster, Switzerland, to be notified and informed that a ship then designated by defendant, named "Sardinian Prince" would probably be at its accustomed landing place in the said City of Antwerp ready there to receive goods according to the terms and provisions of the offers aforesaid, in time to sail thereafter on or about June 5th, 1901, and that such notice and information was given to said firm of Oswald Roth, said consignor of plaintiff only in order that said firm might know when to tender shipments of freight for plaintiff on the landing place in the said City of Antwerp, alongside of said ship "Sardinian Prince" if it desired the same to be shipped as aforesaid upon said vessel in time for departure on June 5th, 1901.

And defendant denies that in consideration of any matter or thing, in accordance with defendant's request, or otherwise, or at all, defendant undertook,

or to the said plaintiff or the said Oswald Roth, acting on behalf of plaintiff, or otherwise, or [8] to any person or persons at any time or place, ever or at all, promised or agreed as such carrier or otherwise, to take care of or to ship on board the SS. "Sardinian Prince," which was to sail on the 5th day of June, 1901, or to safely or securely, or otherwise, keep, carry or convey the goods specified and described in plaintiff's complaint, or any thereof, from the said City of Antwerp to the said City of San Francisco, or from or to or between any other termini, or at all, or to safely or otherwise deliver the same or any thereof, to plaintiff.

And defendant denies that plaintiff by his said consignor, or otherwise, relying on any promise or undertaking of defendant, or otherwise, on or about the 3d day of June, 1901, at the said City of Antwerp, or at any other time or place, ever or at all, did deliver or cause to be delivered to defendant or its duly authorized agent the goods, to wit: the 35 tubs of cheese specified and described in plaintiff's complaint or any thereof, the said goods or any thereof to be by defendant safely or securely or otherwise taken care of, kept, carried, conveyed or delivered in any manner or way, or at all.

And defendant denies that it then and there, or otherwise, at any time or place, ever received or accepted the said goods or any thereof for any of the purposes aforementioned, or for immediate shipment or for any other purpose or at all.

And defendant denies that not regardiing its promise or undertaking or in violation thereof, it has not safely or securely as carrier taken care of, kept,

by jury being hereby expressly waived), upon the statement of facts hereunto attached and argument of counsel; that such Statement of Facts presents all the matter upon which the decision shall be made; that neither party shall introduce any evidence contradictory to any of the facts specified in said statement of facts, and that neither pary shall introduce any evidence in addition to said statement of facts unless said court shall desire a showing made as to some further matter.

San Francisco, the 4th day of February, 1914.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Attorneys for Plaintiff.
LINDLEY & EICKHOFF,
Attorneys for Defendant. [11]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, etc.,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY,
Defendant.

Statement of Facts.

Plaintiff, at the time when the Complaint in this action was filed, and at all times in said complaint mentioned, was, and now is, a citizen and resident of the United States and of the State of California, and

doing business in San Francisco, in said Northern District of California, as importer, under the firm name of "Wieland Bros." Defendant, at all of said times, was, and now is, a foreign corporation, to wit: a corporation of the Dominion of Canada, having a place of business in said San Francisco, and was, and is, a common carrier of goods for hire. At all of the times herein specified defendant maintained an agency in the City of Antwerp, in the Kingdom of Belgium, in sole charge of one Herbert H. Debenham, who, for seven years next preceding the events hereinafter mentioned, had, been, and then was, the European Continental Traffic Agent of the Canadian Pacific Railway Company. It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, to the extent that such shipments could be received by anyone at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in this action) [12] coming there in Bond for export, pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as were necessary to have such shipments of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner

according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafer referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty. The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, and not otherwise, said Debenham, on behalf of defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp to San Francisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements [13] which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied. In

the regular course of business, and pursuant to the terms of the arrangements aforesaid, shipments had been from time to time received by said Debenham for plaintiff, as hereinabove set forth, forwarded to San Francisco, and delivered to plaintiff during five years preceding the shipment here in question.

On May 11, 1901, Oswald Roth, of Uster, Switzerland, shippers of the goods mentioned in the complaint, intending to send the same, via Antwerp, to plaintiff, at San Francisco, by way of defendant's road, from Montreal wrote to Debenham, as follows:

"Messrs. Wieland Bros. at San Francisco have advised me that, in future, I must send my consignments by the last boat leaving Antwerp each month. Please let me know at once when the last sailing will take place this month." (Exhibit 17.)

On May 13, 1901, Debenham answered as follows:

"Referring to yours of the 11th inst. I request you to send me the lot of cheese for account of Wieland Bros. of San Francisco to 'Antwerp Bassins Transit' Station, so that it will arrive on the 22nd inst." (Exhibit 18.)

On May 14, 1901, Oswald Roth answered:

"Yours of the 13th inst. just received, but I cannot get the shipment of 35 tubs ready to-morrow, and as Thursday is a holiday, I cannot send it in time for the sailing on the 22nd. Kindly let me know the date of sailing of the very next steamer following.

. . .

I counted on a sailing on about May 25 or 30." [14] (Exhibit 19.)

On May 17, 1901, Debenham replied:

"Yours of the 14th inst. received and contents noted. Please prepare the cheese so that it may arrive here towards the end of the month; for very probably there will be a sailing for Montreal by the end of the month or on one of the first days of June. I shall have definite news to-morrow or day after, and meanwhile await my advices before shipping."

On May 20, 1901, Debenham wrote to Oswold Roth:

"Confirming mine of the 17th inst. I take pleasure in advising you that the Steamer "Sadinian Prince" will sail on June 5, and I request you therefore to forward to me the lot of cheese to 'Antwerp South Transit' station to arrive not later than June 3." (Exhibit 21.)

On May 24, 1901, Debenham wrote to Oswald Roth again:

"Please let me know by return mail if you will act on my letter of the 30th inst."

At all the times specified in this statement of facts, there was in operation, and known to all the parties hereto, an International Treaty, entered into and binding upon various nations of Europe, including Switzerland, France, Germany and Belgium, pursuant to the provisions of which treaty shipments of merchandise intended for export beyond the territory of any of said nations could be transported through the territory of such nation "In Bond," that is to say, shipments of such merchandise could, pursuant and subject to the provisions of said treaty, be transported into and beyond the territory of such nations without payment of any duty, provided that each of the said shipments of merchandise were con-

tained in receptacles that remained sealed, unbroken and in the uninterrupted, exclusive and [15] official custody of the Governmental customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom. But persons standing in a relationship to such shipments of merchandise, such as Debenham occupied to the shipment in controversy, had the right to direct such Governmental customs authorities when and where such shipments should be delivered for deportation.

On May 25, 1901, the shipment of merchandise (consisting of 35 tubs of cheese) which is involved in this action, and which was a shipment of merchandise intended to be forwarded, pursuant and subject to the provisions of the arrangements aforesaid and of the International Treaty herein specified, through territory belonging to the Republic of Switzerland, The Republic of France, The German Empire, and the Kingdom of Belgium, in Bond for export, from the port of Antwerp, to San Francisco, America, there to be delivered to plaintiff, was placed on board a local railroad train at Uster, Switzerland, consigned to the firm of Niebergall & Goth, forwarders, in Bale, Switzerland, the way-bill indicating that the shipment was sent in Bond in transit to the United States by way of Bale and Antwerp. The car containing the shipment arrived in Bale on May 28th, and the original car containing the shipment was forwarded by Niebergall & Goth on the same day by way of the Alsace-Loraine Imperial Railway, and

the Belgian State Railway, to H. Debenham, Anver-Bassins Station, Antwerp, said Debenham being, pursuant to the arrangements aforesaid, designated as the consignee of the shipment in the accompanying way-bill, covering transit from Bale to Antwerp.

The Alsace-Loraine Imperial Railway took the car containing the goods as far as Sterpenich, a station on the Belgian frontier, where it was received by the Belgian State Railway, [16] about 5 P. M., May 29, 1901, and from there carried by the latter railway to Anvers-Bassin Station, at Antwerp, where it arrived May 30th, 1901. The Belgian State Railway was operated by the Government of the Kingdom of Belgium, and the same officials of the Government who operated the railroad, were also customs officers of the Government acting as such with respect to the freight which was transported by the said railroad, pursuant and subject to the provisions of the Treaty aforesaid. Upon the arrival of the car at Anvers-Bassin Station at Antwerp, as aforesaid, the station authorities notified Mr. Debenham of its arrival, and delivered to him the way-bill accompanying the shipment. According to the provisions of the Treaty aforesaid, and of the Laws of the Kingdom of Belgium, Mr. Debenham then had the option of directing the railroad customs officials to take the goods to the Belgium Govermental Customs Warehouse, called the Entrepot Royal, there to remain until such time as he should direct them to be taken to the ship which was to receive them, or of directing said officials to take the car containing the goods to the wharf at which the ship was to receive them, there to remain

until such time as he should direct the goods to be placed on board such ship. In either case, the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive official custody of the Government Customs authorities until actually loaded on board the ship.

As the ship on which the goods aforesaid were to be embarked for transportation out of the Kingdom of Belgium was not at the time of the arrival of said goods at Antwerp ready to receive the shipment, Mr. Debenham directed the railroad customs officials to take the goods to the Customs Warehouse at the Belgian Government at Antwerp, called the Entrepot Royal, there to be held in [17] the custody of the Belgian customs authorities until he notified the customs authorities that the vessel which was to receive the shipment was ready to receive and embark the shipment for export from Belgium, whereupon it would have been the duty of the Belgian customs authorities to transport the shipment from the Entrepot Royal, said Governmental customs warehouse, to the wharf and there deliver it physically to the ship which was to receive it and to make certain that the shipment was actually embarked on the vessel and carried out of the Kingdom of Belgium. Under the provisions of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, a shipment of merchandise like the one aforesaid, passing through Belgian territory in bond in transit merely, was required to remain uninterruptedly in the ex-

clusive, official custody, possession and control of the customs authorities of the Kingdom of Belgium (subject to the direction of persons standing in a relationship to such shipments such as Debenham occupied to the shipment in controversy, as to when and where such shipments should be delivered for deportation, as aforesaid), until the shipment was actually, physically delivered by such customs authorities, at the instance of the consignee of the shipment, on board the vessel which was to transport it beyond the Kingdom, unless the consignee of such shipment paid to the Belgian Government the charge and duties due on the shipment, and accepted actual physical delivery and possession thereof.

In pursuance of the directions of Mr. Debenham aforesaid, the car which contained the goods involved in the controversy in this action, shortly after its arrival at Antwerp, was taken by the Customs Authorities from the Anvers-Bassin Station to the Entrepot Royal, where, on June 1, 1901, the goods were unloaded from the car and stored in the warehouse, under the exclusive custody and control of the Belgian Customs authorities. Upon receipt of the goods in the warehouse, the customs authorities delivered to [18] Debenham a document called "Acquit de Transit," which Debenham was to keep until the moment when the goods were to be removed from the warehouse to the steamer, and to deliver up to the customs authorities whenever, on his directions, the goods were to be embarked on board of the deporting vessel.

Whenever the goods were to be thus removed, the

law required that Debenham should present this document called "Acquit de Transit" to the customs authorities, whereupon the latter authorities would issue a "remise au depart" (release for departure) and send the goods to the deporting steamer, officers of the Customs remaining in custody thereof until the goods were actually and eventually loaded on board, and thereby passed out of the Kingdom. The warehouse charges were paid by Debenham. The transportation charges from the warehouse to the steamer would have been payable by Debenham, and would have been by him chargeable and collectible from Oswald Roth, the shipper aforesaid.

Mr. Debenham did secure a "remise au depart" for the goods involved in this action before they were destroyed in the Bonded Warehouse.

Mr. Debenham, as agent of the Canadian Pacific Railway Company, advertised in the "Lloyd Anversois," an Antwerp Daily paper, on May 22, 1901, that the steamer "Sardinian Prince" would be able to load for Montreal direct, and would sail on June 5, 1901.

The Steamer "Sardinian Prince" entered the port of Antwerp at noon, on Saturday, June 1, 1901, in ballast, was berthed at Quai Ledeganck, and began to load her cargo on Monday, June 3d, finished loading on June 7th, during the night, and left the port on June 8th.

On June 5th, 1901, at 2:36 P. M., a fire broke out in the Royal Warehouse, called the Entrepot Royal, as aforesaid, which [19] destroyed the building and contents, including the 35 tubs of cheese here in

suit. The fire which destroyed said cheese as aforesaid was not due to any fault or negligence of defendant.

The market value of the cheese at the time and place of its destruction, viz.: on June 5th, 1901, at Antwerp, Belgium, was the sum of 16,569.40 francs, and the value of such cheese at San Francisco, California, on the 1st day of August, 1901, the time when in due course it would have arrived there had it been shipped on the "Sardinian Prince" was the sum of $6200.00.

ANDROS & HENGSTLER,
Attorneys for Plaintiff.
LINDLEY & EICKHOFF,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, etc.,
WIELAND BROS., Inc.,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY,
Defendant.

Stipulation for Submission of Cause on Briefs.

WHEREAS, there was heretofore filed in the above-entitled cause a stipulation submitting said

cause upon an agreed statement of facts, duly filed herein; and whereas a trial by jury was heretofore expressly waived; and whereas the above-entitled cause was heretofore set down for hearing on the 10th day of April, 1914; and whereas counsel for the respective parties hereto are desirous of submitting said cause upon said filed agreed statement of facts and without oral argument and upon briefs.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties hereunto that plaintiff may have to and including the 11th day of May, 1914, within which to file its opening brief, and that defendant may then have to and including the 22d day of June, 1914, within which to file its answering brief, and that plaintiff may then have to and including the 23d day of July, 1914, within which to file its reply brief, and that said cause shall be submitted to the above Honorable Court for its decision upon said briefs.

Dated: San Francisco, Cal., April 9, 1914.

ANDROS & HENGSTLER,
Attorneys for Plaintiff.

LINDLEY & EICKHOFF (per E. P.)
Attorneys for Defendant.

IT IS SO ORDERED.

WM. C. VAN FLEET,
Judge of said Court.

Dated: April 10th, 1914. **[21]**

[Endorsed]: Filed April 10, 1914. Walter B. Maling, Clerk. **[22]**

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Friday, the 10th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,

vs.

CANADIAN PACIFIC RAILWAY CO.

Order Submitting Cause on the Agreed Statement of Facts, etc.

This cause came on regularly this day for trial before the Court sitting without a jury, a trial by jury having been expressly waived by stipulation filed; and upon motion of Golden W. Bell, Esq., attorney for plaintiff, and in accordance with a stipulation filed, it was ordered that this cause be and the same is hereby submitted on the agreed statement of facts heretofore filed and on briefs to be filed as follows: Plaintiff to have until May 11, 1914, defendant to have until June 22, 1914, and plaintiff to have until July 23, 1914, to reply. **[23]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of "WIELAND BROS.,"

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Judgment.

This cause having come on regularly for trial upon the 10th day of April, 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation of the attorneys for the respective parties; upon motion of Golden W. Bell, Esq., attorney for plaintiff, the cause was submitted on an agreed statement of facts and stipulation, heretofore and on the said 10th day of April, 1914, filed and of record in this cause; and upon briefs to be filed; and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having ordered that judgment be entered in favor of plaintiff and against defendant in the sum of Six Thousand Two Hundred ($6,200.00) Dollars, together with interest at 7% per annum from August 1, 1901, to December 14, 1914, and for costs.

Now, therefore, by virtue of the law and by reason

of the premises aforesaid, it is considered by the Court that John Wieland, doing business under the firm name and style of "Wieland Bros.," plaintiff, do have and recover of and from Canadian Pacific Railway Company, a corporation, defendant, the sum of Twelve Thousand, Two and 35/100 ($12,-002.35) Dollars, together with his costs in this behalf expended taxed at $216.68.

Judgment entered December 14, 1914.

WALTER B. MALING,
Clerk. **[24]**

In the District Court of the United States, Northern District of California, Second Division.

Hon. WM. C. VAN FLEET, Judge.

JOHN WIELAND, etc.,

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Monday, December 14, 1914.

Oral Opinion.

LOUIS T. HENGSTLER and GOLDEN W. BELL, for Plaintiff.

LINDLEY & EICKHOFF, for Defendant.

THE COURT (Orally).—In this case the action is one to recover for the value of goods alleged to have been lost in transit by a common carrier. The case is submitted to the Court without the intervention of a jury upon an agreed statement of facts, and

the sole question upon which judgment turns is whether or no the goods had been completely delivered to the defendant at the time of their destruction, which occurred through the intervention of a fire while occurred through the intervention of a fire while they were stored in the Government warehouse in the City of Antwerp in Belgium. The agreed statement of facts shows that for several years—for four or five years—the plaintiff had been shipping goods through the intervention of the defendant, the Canadian Pacific Railway Company, from points on the Continent of Europe, passing through the port of Antwerp, and that the goods in question were shipped to the defendant by parties in Switzerland, **[25]** and through Switzerland and Germany into Belgium to the port of Antwerp. They were shipped in bond under a treaty existing between the States of Switzerland, Germany, Belgium, and France, I think, providing for the carriage in bond through those countries of goods destined for a port in a country other than those covered by the treaty. In this case the goods were destined for the defendant in the United States. The treaty provided that the goods throughout their transportation on the Continent of Europe, and until their shipment on a vessel for transportation to another country should be in the charge of customs officers. Practically, the customs officers who have goods of that character in control and custody and who had the goods here involved, are the train officers, they acting as customs officers and their control over the goods being purely a qualified one for the purpose

of seeing that the goods are shipped out of the country in accordance with their claimed destination, and do not find their way in violation of the customs regulations of the different countries into the commerce of those countries. In this instance the goods were brought to Antwerp; they were consigned by the shipper in accordance with the usual method to the general continental agent of the defendant Canadian Pacific Railway, having an office at Antwerp. Upon their arrival at the City of Antwerp the way-bill or bill of lading, or whatever it is termed, was delivered by the customs authorities, the train officers, to the agent of the defendant. He accepted it. Under the treaty regulations and the law of Belgium there were two or three different methods for the handling of the goods at the port of Antwerp, which were within the direction and control of the consignee. He might have them taken directly on the cars, as these were, to the particular wharf where they were to be loaded on the vessel for transportation, or if desired by the consignee that they be detained **[26]** in Antwerp until the vessel could be ready, or for any other reason, he had the right to then direct that they be taken to the Government Warehouse for the purpose solely of awaiting their shipment upon the vessel that was to carry them. They were at all times, however, after their receipt in Antwerp, subject only to this qualified control of the customs authorities for the purpose of seeing that they were shipped out of the country, at the disposition and control of the consignee. He had the right to make the alternative directions

such as I have indicated. The consignee, the defendant's agent, in this instance, as I have indicated, directed that the goods be taken to the Government Warehouse and there kept until he should further direct their delivery to him for shipment. He subsequently did direct their shipment down to the wharf for the purpose of loading on the vessel, but before the shipment actually occurred, and on the same day or on the day subsequent to the order made by him, a fire occurred in the Government Warehouse and the goods were destroyed, and, as I suggested, the sole question in the case is whether under those circumstances, as a matter of law, the goods can be held as having been in the possession of the defendant so as to charge it as a common carrier rather than as a warehouseman, because its liabilities under the two alternative dispositions would be wholly different.

I am entirely satisfied, under the authorities, that the possession, so far as the consignor is concerned, had been completely delivered into the hands of the defendant. They were so delivered in accordance with the custom or method of trade at that port which had existed as between these same parties for a number of years. The consignor had completely surrendered the goods, so far as lay in his power, to the defendant. The defendant had accepted those goods for transportation, subject only to as I say, this qualified custody of the customs officers for the special and sole purpose of seeing that the customs laws of the country and provisions of [27] the treaty were not violated; and it seems to me

that there can be no question that under the law the liability of the defendant was complete as that of a common carrier. The goods having been consigned to it solely for the purpose of transportation and having been delivered to it at the City of Antwerp solely for that purpose, and having been directed by it to be stored in the warehouse temporarily only for its own convenience, they were in the possession of the defendant as a common carrier and not as a warehouseman, and it thereby became an insurer of their safety and is liable to the demand of the plaintiff for the value of the goods. Judgment will accordingly go in favor of the plaintiff as prayed.

I am satisfied, moreover, upon the incidental question as to the measure of damages, that the theory of the plaintiff is correct and that they are entitled to the value of the goods as of the date of delivery in this country, and not their value in Antwerp when destroyed.

[Endorsed]: Filed Dec. 14, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[28]**

In the District Court of the United States, for the Northern District of California, Ninth Judicial District, Department No. 2.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of "WIELAND BROS.,"

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Petition for Writ of Error.

The defendant in the above-entitled action, feeling itself aggrieved by the judgment entered on the 14th day of December, 1914, in said action, comes now by Lindley & Eickhoff, its attorneys, and petitions the above court for an order allowing said defendant to prosecute a Writ of Error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in the above-entitled Court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioners will ever pray.

LINDLEY & EICKHOFF,
Attorneys for Defendant.

We hereby acknowledge service of the within petition for writ of error by receipt of copy this 18th day of January 1915.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Attorneys for Plaintiff. [29]

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

In the District Court of the United States, for the Northern District of California, Ninth Judicial District, Department No. 2.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of "WIELAND BROS.,"

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Comes now the defendant above-named, and assigns the following errors upon which it will rely upon the review on Writ of Error to the United States Circuit Court of Appeals (Ninth Circuit), of the judgment given by this Court in this cause:

The Court erred in deducing and determining from, and in deciding and adjudging upon the agreed statement of facts placed of record by the parties as aforesaid (the same being the agreed statement of facts mentioned and referred to in and by the judgment and opinion of the Court rendered in this case), the following as conclusions of law, viz.:

I.

That the goods which are involved in the controversy in this action had been completely delivered to and were in the possession of defendant as a common carrier at the time when they were destroyed by fire under the circumstances specified in the statement of facts aforesaid.

II.

The Court erred in failing to decide that the said goods at the time of their destruction by fire in the Royal Governmental [31] Warehouse of the Kingdom of Belgium, under the exclusive, actual, physical and official custody and control of the Governmental Customs Officers of said Kingdom, were in *custodia legis* and not in the possession of defendant.

III.

The Court erred in holding that although the goods were stored in the Royal Governmental Warehouse of the Kingdom of Belgium, under the circumstances specified in said agreement of facts, the defendant became an insurer of their safety, and liable to the demand of the plaintiff for the value of the goods, notwithstanding the fact that the fire which destroyed the goods was not due to any fault or negligence of defendant.

IV.

The Court erred in giving and entering judgment for the plaintiff in said action, and against said defendant.

V.

The Court erred in fixing the amount of the value of said goods as of the date of the delivery at San Francisco, and not as of the date of their destruction at the port of Antwerp.

Wherefore, defendant prays that the judgment of said Court be reversed.

LINDLEY & EICKHOFF,
Attorneys for Defendant.

We hereby acknowledge service of the within Assignment of Errors by receipt of copy this 18th day of January 1915.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By. J. A. Schaertzer, Deputy Clerk. [32]

In the District Court of the United States, for the Northern District of California, Ninth Judicial District, Department No. 2.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error.

Upon the motion of Lindley & Eickhoff, attorneys for the defendant in the above-entitled action, and upon filing a petition for Writ of Error, together with an assignment of errors,

IT IS HEREBY ORDERED that a Writ of Error be, and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be, and is hereby fixed at $15,000.00, said bond to operate as a cost and supersedeas bond.

Done in open court this 19th day of January, 1915.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

In the District Court of the United States, for the Northern District of California, Ninth Judicial District, Department No. 2.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, viz., the corporation duly created, organized and existing under and by virtue of the laws of the Dominion of Canada, named Canadian Pacific Railway Company, the defendant in the above-entitled action, as principal, and the corporation duly created, organized and existing under and by virtue of the laws of the State of New York, named American Surety Company of New York, as surety, are held and firmly bound unto John Wieland (doing business under the firm name and style of Wieland Bros.), the plaintiff in the above-entitled action, in the full and just sum of Fifteen Thousand ($15,000.00) Dollars, to be paid to the said John Wieland (doing business under the firm name and style of Wieland Bros.), said plaintiff, and his executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors,

administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 8th day of February, in the year of our Lord one thousand nine hundred and fifteen (1915).

The condition of the above obligation is THAT WHEREAS, lately at a session of the District Court of the United States, in and for the Northern District of California, Department 2 thereof, in an action pending in said Court between the said [34] John Wieland (doing business under the firm name and style of Wieland Bros.), plaintiff, and said corporation, Canadian Pacific Railway Company, defendant, a judgment was rendered and entered against the said Canadian Pacific Railway Company, said defendant; and

WHEREAS, the said defendant, Canadian Pacific Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the said judgment rendered by the said District Court in the above-entitled action;

NOW, THEREFORE, if the said Canadian Pacific Railway Company, the said defendant, shall prosecute said writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make good its plea then the above obligation is to be void; otherwise to remain in full force and effect; and

IT IS EXPRESSLY AGREED by said corporation, American Surety Company of New York, the surety hereto, that in case of breach of any condition

of this bond, the said District Court of the United States, for the Northern District of California, may, upon notice of not less than ten days to said surety, proceed summarily in the above-entitled action, to ascertain the amount which such surety is bound to pay on account of such breach, and render judgment therefor against defendant, and award execution therefor.

[Seal Canadian Pacific Railway.]

CANADIAN PACIFIC RAILWAY COMPANY,

By E. M. BUIMICH (?),

Vice-President.

H. C. OSWALD(?),

Assistant Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,

By H. J. DOUGLAS,

Resident Vice-president.

[Seal American Surety Co.]

Attest: V. H. GALLAWAY,

Resident Assistant Secretary. [35]

The foregoing bond is hereby approved the 10th day of February, 1915.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Feb. 10, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, etc.,

Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please make transcript of record in the above-entitled action, embodying therein especially the following papers:

Plaintiff's Complaint;

Answer of Defendant;

The Agreed Statement of Facts, together with the stipulation of the parties submitting the cause for decision upon the said agreed statement;

The stipulation waiving trial by jury;

The order of the Court of the 10th of April, 1914, submitting the cause upon the agreed statement of facts and briefs to be filed thereafter;

The judgment of the Court, and the opinion of the Judge in giving judgment for plaintiff;

The Petition for Writ of Error;

The Assignment of Errors;

The Order Allowing Writ of Error;

The Supersedeas Bond;

The Writ of Error, and the Citation issued thereon.

Dated San Francisco, Feb. 11th, 1915.

LINDLEY & EICKHOFF,
Attorneys for Defendant (per E. P.).

[Endorsed]: Filed Feb. 11, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [37]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

CLERK'S CERTIFICATE TO RECORD ON APPEAL ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-seven (37) pages, numbered from 1 to 37, inclusive, to be a full, true and correct copy of the complaint; answer of defendant; stipulation submitting cause upon agreed statement of facts; statement of facts;

stipulation for submission of cause on briefs; order submitting cause on the agreed statements of facts, etc.; judgment; oral opinion; petition for writ of error; assignment of errors; order allowing writ of error; bond and praecipe in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $21.20; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of March, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

[Internal Revenue Stamp. Canceled March 10, 1915. W. B. M.] [38]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you,

between Canadian Pacific Railway Company, a Corporation, plaintiff in error, and John Wieland, doing business under the firm name and style of Wieland Bros., defendant in error, a manifest error hath happened, to the great damage of the said Canadian Pacific Railway Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 10th day of February, in the year of our Lord one

thousand nine hundred and fifteen.

WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
District Judge.

Due service of the within Writ of Error is hereby admitted by receipt of copy this 11th day of February, 1915.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Attorneys for Defendant in Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

WALTER B. MALING,
Clerk.

[Endorsed]: No. 13,240. United States District Court for the Northern District of California, Second Division. Canadian Pacific Railway Company

(a Corporation), Plaintiff in Error, vs. John Wieland, Doing Business Under the Firm Name and Style of Wieland Bros., Defendant in Error. Writ of Error. Filed Feb. 11, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to John Wieland, Doing Business Under the Firm Name and Style of Wieland Bros., and to Andros & Hengstler, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Canadian Pacific Railway Company, a Corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 10th day of February, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge.

Due service of the within Citation on Writ of Error is hereby admitted by receipt of copy this 11th day of February, 1915.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Attorneys for Defendant in Error.

[Endorsed]: No. 13,240. United States District Court for the Northern District of California, Second Division. Canadian Pacific Railway Company (a Corporation), Plaintiff in Error, vs. John Wieland, Doing Business Under the Firm Name and Style of Wieland Bros., Defendant in Error. Citation on Writ of Error. Filed Feb. 11, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2582. United States Circuit Court of Appeals for the Ninth Circuit. Canadian Pacific Railway Company, a Corporation, Plaintiff in Error, vs. John Wieland, Doing Business Under the Firm Name and Style of Wieland Bros., Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed March 10, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 13,240.

JOHN WIELAND, Doing Business Under the Firm Name and Style of WIELAND BROS.,
Plaintiff,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Stipulation and Order Substituting Party.

WHEREAS, subsequent to the beginning of the above-entitled action, the plaintiff, John Wieland, died; and whereas, the successors of said deceased thereafter incorporated under the name of Wieland Bros., Inc.; and whereas said corporation, Wieland Bros., Inc., is now the real party plaintiff in interest herein;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED that said Wieland Bros., Inc., a corporation, may be, and it is hereby, substituted herein as the plaintiff, and that any recovery which may be had herein from the defendant, Canadian Pacific Railway Company, a corporation, may be paid to said Wieland Bros., Inc., a corporation.

ANDROS & HENGSTLER,
Attorneys for Plaintiff.
LINDLEY & EICKHOFF,
Attorneys for Defendant.

So ordered this 5th day of February, 1914.

WM. C. VAN FLEET,
Judge of said Court.

[Endorsed]: Filed Feb. 6, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

No. 13,240.

JOHN WIELAND, etc.

vs.

CANADIAN PACIFIC RY. CO., a Corp.

Certificate of Clerk U. S. District Court to Copy of Stipulation and Order Substituting Party.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original Stipulation and Order Substituting Party, signed and filed February 6, 1914, in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of March, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

[Internal Revenue Stamp. Canceled March 16, 1915. J. A. S.]

[Endorsed]: No. 2582. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 16, 1915. F. D. Monckton, Clerk.

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No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),
Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,
Defendant in Error.
(Plaintiff below).

BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
EMIL POHLI,
Attorneys for Plaintiff in Error.

Filed this ..... *day of* ....., *1915.*

Filed
MAY 17 1915
FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*
F. D. Monckton,
Clerk.

No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error.
(Plaintiff below).

BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

Statement of the Case.

This is an action brought by the defendant in error to recover the alleged value of a certain shipment of goods which defendant in error claims to have delivered to plaintiff in error for transportation from Antwerp, in the Kingdom of Belgium, to San Francisco, California. The goods were destroyed by fire while they were stored in the Gov-

ernment warehouse at Antwerp, in the exclusive custody of the customs authorities of the Kingdom of Belgium under the circumstances described in the Agreed Statement of Facts, hereinafter set forth.

The contention of defendant in error (plaintiff below) is that the goods involved before the time of their destruction had been delivered and accepted by plaintiff in error as carrier for immediate transportation; that the fact that the goods were destroyed while in the Government warehouse in the exclusive custody of the Belgium customs officials does not in any way limit, or vary, or change the responsibility of the plaintiff in error, and that it is liable for the goods as an insurer thereof.

On the other hand, the contention of the plaintiff in error (defendant below) is that the goods were never, before their destruction, in the possession, custody and control of the plaintiff in error; that, on the contrary, being in the exclusive custody of the Belgian customs officials in the warehouse of the Government of the Kingdom of Belgium, the goods were in *custodia legis,* and being there destroyed without any fault on the part of plaintiff in error, it is relieved from liability for their loss, as an insurer.

The Facts.

There is no dispute as to the facts; our contention arises over what we conceive to be a misap-

prehension on the part of the trial court as to the legal consequences flowing from them.

The agreed statement of facts is as follows:

> "Plaintiff, at the time when the Complaint in this action was filed, and at all times in said complaint mentioned, was, and now is, a citizen and resident of the United States and of the State of California, and doing business in San Francisco, in said Northern District of California, as importer, under the firm name of 'Wieland Bros.' Defendant, at all of said times, was, and now is, a foreign corporation, to wit: a corporation of the Dominion of Canada, having a place of business in said San Francisco, and was, and is, a common carrier of goods for hire. At all of the times herein specified defendant maintained an agency in the City of Antwerp, in the Kingdom of Belgium, in sole charge of one Herbert H. Debenham, who, for seven years next preceding the events hereinafter mentioned, had been, and then was, the European Continental Traffic Agent of the Canadian Pacific Railway Company. It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, to the extent that such shipments could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in this action) coming there in bond for export pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as were necessary to have such shipments of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at

Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty. The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, and not otherwise, said Debenham, on behalf of defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp to San Francisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements [13] which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied. In the regular course of business, and pursuant to the terms of the arrangements aforesaid, shipments had been from time to time received

by said Debenham for plaintiff, as hereinabove set forth, forwarded to San Francisco, and delivered to plaintiff during five years preceding the shipment here in question.

On May 11, 1901, Oswald Roth, of Uster, Switzerland, shippers of the goods mentioned in the complaint, intending to send the same, via Antwerp, to plaintiff, at San Francisco, by way of defendant's road, from Montreal wrote to Debenham, as follows:

'Messrs. Wieland Bros. at San Francisco have advised me that, in future, I must send my consignments by the last boat leaving Antwerp each month. Please let me know at once when the last sailing will take place this month.' (Exhibit 17.)

On May 13, 1901, Debenham answered as follows:

'Referring to yours of the 11th inst. I request you to send me the lot of cheese for account of Wieland Bros. of San Francisco to "Antwerp Bassins Transit" Station, so that it will arrive on the 22nd inst.' (Exhibit 18.)

On May 14, 1901, Oswald Roth answered:

'Yours of the 13th inst. just received, but I cannot get the shipment of 35 tubs ready tomorrow, and as Thursday is a holiday, I cannot send it in time for the sailing on the 22nd. Kindly let me know the date of sailing of the very next steamer following. * * * I counted on a sailing on about May 25 or 30.' (Exhibit 19.)

On May 17, 1901, Debenham replied:

'Yours of the 14th inst. received and contents noted. Please prepare the cheese so that it may arrive here towards the end of the month; for very probably there will be a sailing for Montreal by the end of the month or on one of the first days of June. 'I shall have definite

news to-morrow or day after, and meanwhile await my advices before shipping.'

On May 20, 1901, Debenham wrote to Oswald Roth:

'Confirming mine of the 17th inst. I take pleasure in advising you that the Steamer "Sadinian Prince" will sail on June 5, and I request you therefore to forward to me the lot of cheese to "Antwerp South Transit" Station to arrive not later than June 3.' (Exhibit 21.)

On May 24, 1901, Debenham wrote to Oswald Roth again:

'Please let me know by return mail if you will act on my letter of the 30th inst.'

At all the times specified in this statement of facts, there was in operation, and known to all the parties hereto, an International Treaty, entered into and binding upon various nations of Europe, including Switzerland, France, Germany and Belgium, pursuant to the provisions of which treaty shipments of merchandise intended for export beyond the territory of any of said nations could be transported through the territory of such nation 'In Bond', that is to say, shipments of such merchandise could, pursuant and subject to the provisions of said treaty, be transported into and beyond the territory of such nations without payment of any duty, provided that each of the said shipments of merchandise were contained in receptacles that remained sealed, unbroken and in the uninterrupted, exclusive and official custody of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom. But persons standing in a relationship to such shipments of merchandise, such as Debenham occupied to the shipment in controversy, had the

right to direct such Governmental customs authorities when and where such shipments should be delivered for deportation.

On May 25, 1901, the shipment of merchandise (consisting of 35 tubs of cheese) which is involved in this action, and which was a shipment of merchandise intended to be forwarded, pursuant and subject to the provisions of the arrangements aforesaid and of the International Treaty herein specified, through territory belonging to the Republic of Switzerland, The Republic of France, The German Empire, and the Kingdom of Belgium, in Bond for export, from the port of Antwerp, to San Francisco, America, there to be delivered to plaintiff, was placed on board a local railroad train at Uster, Switzerland, consigned to the firm of Niebergall & Goth, forwarders, in Bale, Switzerland, the way-bill indicating that the shipment was sent in Bond in transit to the United States by way of Bale and Antwerp. The car containing the shipment arrived in Bale on May 28th, and the original car containing the shipment was forwarded by Niebergall & Goth on the same day by way of the Alsace-Loraine Imperial Railway, and the Belgian State Railway, to H. Debenham, Anver-Bassins Station, Antwerp, said Debenham being, pursuant to the arrangements aforesaid, designated as the consignee of the shipment in the accompanying way-bill, covering transit from Bale to Antwerp.

The Alsace-Loraine Imperial Railway took the car containing the goods as far as Sterpenich, a station on the Belgian frontier, where it was received by the Belgian State Railway, about 5 p. m., May 29, 1901, and from there carried by the latter railway to Anvers-Bassin Station, at Antwerp, where it arrived May 30th, 1901. The Belgian State Railway was operated by the Government of the Kingdom of Belgium, and the same officials of the Government

who operated the railroad, were also customs officers of the Government acting as such with respect to the freight which was transported by the said railroad, pursuant and subject to the provisions of the Treaty aforesaid. Upon the arrival of the car at Anvers-Bassin Station at Antwerp, as aforesaid, the station authorities notified Mr. Debenham of its arrival, and delivered to him the way-bill accompanying the shipment. According to the provisions of the Treaty aforesaid, and of the Laws of the Kingdom of Belgium, Mr. Debenham then had the option of directing the railroad customs officials to take the goods to the Belgium Governmental Customs Warehouse, called the Entrepot Royal, there to remain until such time as he should direct them to be taken to the ship which was to receive them, or of directing said officials to take the car containing the goods to the wharf at which the ship was to receive them, there to remain until such time as he should direct the goods to be placed on board such ship. In either case, the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive official custody of the Government Customs authorities until actually loaded on board the ship.

As the ship on which the goods aforesaid were to be embarked for transportation out of the Kingdom of Belgium was not at the time of the arrival of said goods at Antwerp ready to receive the shipment, Mr. Debenham directed the railroad customs officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the Entrepot Royal, there to be held in the custody of the Belgian customs authorities until he notified the customs authorities that the vessel which was to receive the shipment was ready to receive

and embark the shipment for export from Belgium, whereupon it would have been the duty of the Belgian customs authorities to transport the shipment from the Entrepot Royal, said Governmental customs warehouse, to the wharf and there deliver it physically to the ship which was to receive it and to make certain that the shipment was actually embarked on the vessel and carried out of the Kingdom of Belgium. Under the provisions of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, a shipment of merchandise like the one aforesaid, passing through Belgian territory in bond in transit merely, was required to remain uninterruptedly in the exclusive, official custody, possession and control of the Customs authorities of the Kingdom of Belgium (subject to the direction of persons standing in a relationship to such shipments such as Debenham occupied to the shipment in controversy, as to when and where such shipments should be delivered for deportation, as aforesaid), until the shipment was actually, physically delivered by such customs authorities, at the instance of the consignee of the shipment, on board the vessel which was to transport it beyond the Kingdom, unless the consignee of such shipment paid to the Belgian Government the charge and duties due on the shipment, and accepted actual physical delivery and possession thereof.

In pursuance of the directions of Mr. Debenham aforesaid, the car which contained the goods involved in the controversy in this action, shortly after its arrival at Antwerp, was taken by the Customs authorities from the Anvers-Bassin Station to the Entrepot Royal, where, on June 1, 1901, the goods were unloaded from the car and stored in the warehouse, under the exclusive custody and control of the Belgian Customs authorities. Upon receipt of the goods in the warehouse, the Customs authorities

delivered to Debenham a document called 'Acquit de Transit', which Debenham was to keep until the moment when the goods were to be removed from the warehouse to the steamer, and to deliver up to the customs authorities whenever, on his directions, the goods were to be embarked on board of the deporting vessel.

Whenever the goods were to be thus removed, the law required that Debenham should present this document called 'Acquit de Transit' to the Customs authorities, whereupon the latter authorities would issue a 'remise au depart' (release for departure) and send the goods to the deporting steamer, officers of the Customs remaining in custody thereof until the goods were actually and eventually loaded on board, and thereby passed out of the Kingdom. The warehouse charges were paid by Debenham. The transportation charges from the warehouse to the steamer would have been payable by Debenham, and would have been by him chargeable and collectible from Oswald Roth, the shipper aforesaid.

Mr. Debenham did secure a 'remise au depart' for the goods involved in this action before they were destroyed in the Bonded Warehouse.

Mr. Debenham, as agent of the Canadian Pacific Railway Company, advertised in the 'Lloyd Anversois', an Antwerp daily paper, on May 22, 1901, that the steamer 'Sardinian Prince' would be able to load for Montreal direct, and would sail on June 5, 1901.

The steamer 'Sardinian Prince' entered the port of Antwerp at noon, on Saturday, June 1, 1901, in ballast, was berthed at Quai Ledeganck, and began to load her cargo on Monday, June 3d, finished loading on June 7th, during the night, and left the port on June 8th.

On June 5th, 1901, at 2:36 p. m., a fire broke out in the Royal Warehouse, called the Entre-

pot Royal, as aforesaid, which destroyed the building and contents, including the 35 tubs of cheese here in suit. The fire which destroyed said cheese as aforesaid was not due to any fault or negligence of defendant.

The market value of the cheese at the time and place of its destruction, viz.: on June 5th, 1901, at Antwerp, Belgium, was the sum of 16,569.40 francs, and the value of such cheese at San Francisco, California, on the 1st day of August, 1901, the time when in due course it would have arrived there had it been shipped on the 'Sardinian Prince', was the sum of $6200.00."

(Transcript, pp. 12 to 22.)

Specification of the Errors Assigned and Relied Upon by Plaintiff in Error.

Upon the facts as set forth in the foregoing agreed statement, the plaintiff in error assigns and relies upon the following specifications of error:

1. The court erred in deducing and determining from the agreed statement of facts that the goods which are involved in the controversy in this action had been completely delivered to the plaintiff in error as a common carrier at the time when they were destroyed by fire in the Royal warehouse of the Kingdom of Belgium at Antwerp.

2. The court erred in failing to decide that the said goods at the time of their destruction by fire in the Royal Government warehouse of the Kingdom of Belgium under the exclusive, actual, physical and official custody and control of the Governmental

Customs Officers of said Kingdom, were in *custodia legis* and not in the possession of plaintiff in error.

3. The court erred in holding that although the goods were stored in the Royal Government warehouse of the Kingdom of Belgium, under the circumstances specified in said agreed statement of facts, the plaintiff in error became an insurer of their safety, and liable to the demand of the defendant in error for the value of the goods, notwithstanding the fact that the fire which destroyed the goods was not due to any fault or negligence of the plaintiff in error.

4. The court erred in giving and entering judgment for the said defendant in error, and against said plaintiff in error.

5. The court erred in fixing the amount of the value of the said goods as of the date of the delivery at San Francisco, and not as of the date of their destruction at the Port of Antwerp.

Argument.

I.

THE GOODS INVOLVED IN THIS CASE HAD NOT BEEN, BEFORE THE TIME OF THEIR DESTRUCTION, DELIVERED TO AND ACCEPTED BY THE PLAINTIFF IN ERROR AS A CARRIER FOR IMMEDIATE TRANSPORTATION.

The ordinary rule relative to the general liability of carriers for freight which they have undertaken

to carry is stated by various text writers to be as follows:

> "It will therefore be found that while private carriers, whether with or without reward, are strictly bailees and nothing more; and that questions as to their liability are to be determined by the ordinary rules which govern the responsibility of bailees, the common carrier of goods stands upon an entirely different footing, and when questions as to his liability for the loss of the goods or their injury whilst in his custody for the purpose of carriage arise, they must be decided upon principles peculiarly applicable to them, and which have no application to any other kind of bailment except that to the inkeeper by his guest. In all other cases of bailment, for instance, the very foundation of the bailee's liability is negligence in some degree, either greater or less, according to the particular nature of the bailment, and before he can be made liable the requisite negligence must be shown. But the question of negligence, when the purely common-law relation of common carrier to the goods exists, is ordinarily wholly foreign to the inquiry whether such a carrier is to be held liable for their loss or injury, and, as will hereafter be seen, evidence on his part of the most exact diligence will be wholly irrelevant and inadmissible. If, for example, the private carrier or any other ordinary bailee be robbed of the goods, or if they should be accidentally destroyed by fire or any other calamity, without negligence on his part, the law will excuse him; but if they be taken from a common carrier by force ever so irresistible less than the public enemy, or if they should be destroyed by fire ever so unavoidable, he will nevertheless be liable for them. He is an insurer of the goods against all losses except those caused by the act of God,

the public enemy, *the law,* the owner, or the inherent nature of the goods. His extraordinary liability rests upon a rule of law, applicable to but two classes, which had its rise in reasons of public policy, and not upon the contract of bailment, although without the bailment the liability cannot exist."

Hutchinson on Carriers, Sec. 4.

"The common law liability of the common carrier of goods, in the absence of special contract or proven custom limiting such liability, is that of an insurer against loss or injury of the property, while in its custody or under its control as a common carrier, etc."

Moore on Carriers, Sec. 2 (2nd Ed.), p. 26.

See also:

Angel on Carriers, Sec. 148, et seq.;

Kent's Commentaries Star, pp. 597, 598.

But the rule above stated does not take effect until and unless the goods were delivered to and accepted by the carrier.

Before this extraordinary liability can be charged upon a carrier, it must appear that the goods were delivered to and accepted for transportation by the carrier.

Hutchinson on Carriers (3rd Ed.), Sec. 104, p. 101.

"The delivery must be complete. The duties and obligations of the common carrier with respect to the goods commence with their delivery to him; and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and

the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. They must be delivered to the carrier himself, or to some agent of his, authorized to receive them on his behalf."

Hutchinson on Carriers (3rd Ed.), Sec. 105, p. 102.

"The responsibility of a common carrier therefore is fixed by the acceptance of the goods, whether the acceptance be in a special manner or according to the usage of his business. But an acceptance in some way is indispensable, for if it appears that there is no intention to *trust the carrier with the custody of the goods* he will not be liable."

Angel on Carriers, Sec. 140.

"To complete the delivery of the property within the rules laid down in the authorities, *it is essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business of the carrier and under his immediate control. It must be accepted and received by the agent.* There must be an actual delivery of the goods to the carrier or a constructive delivery, with notice to it of an intention thereby to place them in its care and custody * * * The property must have been delivered into the *exclusive control of the carrier and accepted by the latter in that capacity for transportation.*" (Italics ours.)

Moore on Carriers (2nd Ed.), Sec. 3, p. 174.

When the delivery becomes complete:

"The entire responsibility for the safety of the goods being shifted from the owner to the

common carrier as soon as the delivery is made, it frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time such delivery becomes complete; for, as we have seen, *until the entire exclusive custody of them has been given to the carrier, no responsibility rests upon him in that character.* The most that can be said generally upon this subject is, that a tender of the goods being made to the carrier, his liability for their safety as carrier arises *eo instanti* with his acceptance of them. The difficulty lies in applying the law in such cases and not in its statement; that is, in determining in the particular instance exactly at what time the circumstances show the acceptance to have taken place. To effect a delivery to the carrier there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and until this has been done it cannot be said that the carrier has assumed any responsibility for them as carrier." (Italics are ours.)

Hutchinson on Carriers, (3rd Ed.) Sec. 119, p. 116, and cases cited.

See Union Trust Co. v. Wilson, 198 U. S. 537.

"We think the rule well established that when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. (Kansas City Co. v. Barnett, 61 S. W. (Ark.) 919.) But we believe it equally well settled that such liability does not attach

until the goods are unconditionally surrendered by the shipper and accepted by the carrier."

Chicago &c. v. Powers, (Nebraska) 103 Northwestern 679.

"Defendant is not liable, or plaintiff entitled to recover, unless it had possession or control of the goods at the time of their destruction."

H. L. Edwards D. Co. v. Texas-Midland Co., 81 Southwestern Rep., p. 801, and cases cited in opinion.

It thus appears that the extraordinary liability (responsibility) of the common carrier as an insurer is charged upon him because of the fact that goods when once delivered to and accepted by him are completely and unconditionally surrendered into his possession and control.

Defendant in error appears to concede that the rule is as above stated, and seeks to bring this case within the application of the rule by contending that the liability of the common carrier commences whenever and as soon as the goods have been delivered to and accepted by him solely for transportation although they may not be put immediately *in itinere.*

Many cases no doubt arise in which such a contention would be proper. But it is to be noted that it is applied only to cases where the carrier has *unconditionally* accepted the goods for immediate transportation and has received them in *his own*

warehouse or *place of keeping,* and for his own convenience as a mere accessory to the carriage.

The liability does not attach until the goods to be shipped are *unconditionally* delivered by the shipper and accepted by the carrier.

> Chicago, etc. v. Powers, 73 Neb. 816; 103 N. W. 678.

The relation of shipper and carrier does not begin between the owner of goods and the carrier, though the former may have delivered the goods to the latter, if, after such delivery, anything required either by law or the contract remains to be done by the shipper. The responsibility does not commence until the delivery has been completed. The goods must have been delivered into the exclusive control of the carrier and accepted by the latter in that character for transportation.

> Moore on Carriers, (2nd Ed.) Vol. I, pp. 171, 172 and cases cited.

In a case which in many respects was analogous to the case at bar, the U. S. Supreme Court said:

> "Cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a

> cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation."
>
> St. Louis &c. Railway v. Commercial Ins. Co., 139 U. S. 223, 237.

In this case the goods were not and could not have been delivered to or accepted by the carrier so as to charge it with liability as an insurer.

In the case at bar, the carrier which transported the goods into Belgium was bound, by virtue of the character of the shipment, under the law, to deliver them into the custody of the Governmental authorities, not for the convenience of defendant, the carrier, or as an accessory to his carriage, but for the purpose of impounding the goods in the exclusive keeping of the Government for the protection of the Government. Such a delivery was necessarily subject to the regulations of the law and of the Revenue Department of the Government (C. and N. W. R. R. Co. v. Sawyer, 69 Illinois 292), and the goods involved, at the time of their destruction, had been duly delivered to and were in the possession and custody and control of the duly constituted Customs authorities of the Kingdom of Belgium.

II.

THE GOODS BEING, AT THE TIME OF THEIR DESTRUCTION, IN THE ROYAL GOVERNMENT WAREHOUSE OF THE KINGDOM OF BELGIUM, IN THE EXCLUSIVE, ACTUAL, PHYSICAL AND OFFICIAL CUSTODY AND CONTROL OF THE BELGIAN CUSTOMS OFFICIALS, WERE IN CUSTODIA LEGIS, AND NOT IN THE POSSESSION OF THE PLAINTIFF IN ERROR.

There can be no doubt, we think, that goods in the possession of Customs authorities are in the custody of the Government. The place in which the goods are thus kept is not the essential fact, *but the custody of the Government, and the consequent exclusion of control over them by the owner,* which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when *he is at liberty to take possession of them.* Ordinarily, *goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody.*

Hartranft v. Oliver, 125 U. S. 525, 527.

Omitting reference at this time to the Agreed Statement of Facts, we contend that, as a matter of law, plaintiff, who shipped goods *in bond,* as shown, must be presumed to have known that the goods so shipped were to remain in the custody and control of Government officials, and could

not be delivered to defendant until they were actually embarked aboard ship for exportation.

> "The parties to the contract of carriage must be presumed to have contracted with the common knowledge of the necessity for customs detention and inspection, and the burden is on the shipper to make provision for the passage of his property beyond the borders of the foreign territory, if non-dutiable. *The carrier is wholly powerless to prevent its seizure and detention and he cannot be held liable for its destruction, either in transit or at the place of destination, while in the possession of customs house officials, by a fire which he did not occasion, and which he could not, by any possible act of diligence, have prevented.*"
>
> Hutchinson on Carriers, (3rd Ed.) Vol. 2, Sec. 755, p. 837, and cases cited.

This is conclusively evidenced by the Agreed Statement of Facts, which shows that:

> "At all of the times herein specified defendant maintained an agency in the City of Antwerp, in the Kingdom of Belgium, in sole charge of one Herbert H. Debenham, who, for seven years next preceding the events hereinafter mentioned, had been, and then was, the European Continental Traffic Agent of the Canadian Pacific Railway Company. It was the duty of said H. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, *to the extent that such shipments could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified,* and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in

this action) coming there in bond for export, pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as were necessary to have such shipments of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty.

The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with the defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, and not otherwise, said Debenham, on behalf of the defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp, to San Fran-

cisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied.

There was in operation, and known to all the parties hereto, an International Treaty, entered into and binding upon various nations of Europe, including Switzerland, France, Germany and Belgium, pursuant to the provisions of which treaty shipments of merchandise intended for export beyond the territory of any of said nations could be transported through the territory of such nation *'In Bond'* that is to say, shipments of merchandise could, pursuant and subject to the provisions of said treaty, be transported into and beyond the territory of such nations without payment of any duty, provided that each of said shipments of merchandise were contained in receptacles that remained sealed, unbroken and in the uninterrupted, exclusive and official custody of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom. But persons standing in a relationship to such shipments of merchandise, such as Debenham occupies to the shipment in controversy, had the right to direct such Governmental Customs authorities when and where such shipments should be delivered for deportation.

On May 25th, 1901, the shipment of merchandise (consisting of 35 tubs of cheese), which is involved in this action, and which was a shipment of merchandise intended to be forwarded, *pursuant and subject to the provisions of the*

arrangements aforesaid and of the International Treaty herein specified, through territory belonging to the Republic of Switzerland, The Republic of France, The German Empire, *and the Kingdom of Belgium, In Bond for Export, from the port of Antwerp, to San Francisco, America,* there to be delivered to plaintiff was placed on board a local railroad train at Uster, Switzerland, consigned to the firm of Niebergall & Goth, forwarders, in Bale, Switzerland, the way-bill indicating that the shipment was sent in bond in transit to the United States by way of Bale and Antwerp. The car containing the shipment arrived in Bale on May 28th, and the original car containing the shipment was forwarded by Niebergall & Goth on the same day by way of the Alsace-Loraine Imperial Railway, and the Belgian State Railway to H. Debenham, Anvers-Bassins Station, Antwerp, said Debenham being, pursuant to the arrangements aforesaid, designated as the consignee of the shipment in the accompanying way-bill, covering transit from Bale to Antwerp.

The Alsace-Loraine Imperial Railway took the car containing the goods as far as Sterpenich, a station on the Belgian frontier, where it was received by the Belgian State Railway, about 5 P. M., May 29, 1901, and from there carried by the latter railway to Anvers-Bassin Station, at Antwerp, where it arrived May 30th, 1901. *The Belgian State Railway was operated by the Government of the Kingdom of Belgium, and the same officials of the Government who operated the railroad, were also customs officers of the Government acting as such with respect to the freight which was transported by the said railroad, pursuant and subject to the provisions of the Treaty aforesaid.* Upon the arrival of the car at Anvers-Bassin Station at Antwerp, as aforesaid, the station authorities notified Mr. Debenham of its arrival, and delivered to him

the way-bill accompanying the shipment. According to the provisions of the Treaty aforesaid, and of the Laws of the Kingdom of Belgium, Mr. Debenham then had the option of directing the railroad customs officials to take the goods to the Belgian Governmental Customs Warehouse, called the Entrepot Royal, there to remain until such time as he should direct them to be taken to the ship which was to receive them, or of directing said officials to take the car containing the goods to the wharf at which the ship was to receive them, there to remain until such time as he should direct the goods to be placed on board such ship. *In either case, the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive official custody of the Governmental Customs authorities until actually loaded on board the ship.*

As the ship on which the goods aforesaid were to be embarked for transportation out of the Kingdom of Belgium was not at the time of the arrival of said goods at Antwerp ready to receive the shipment, Mr. Debenham directed the railroad-customs-officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the Entrepot Royal, there to be held in the custody of the Belgian Customs authorities until he notified the Customs authorities that the vessel which was to receive the shipment was ready to receive and embark the shipment for export from Belgium, whereupon it would have been the duty of the Belgian Customs authorities to transport the shipment from the Entrepot Royal, said Governmental customs warehouse, to the wharf and there deliver it physically to the ship which was to receive it and to make certain that the shipment was actually embarked on the vessel and carried out

of the Kingdom of Belgium. *Under the provisions of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, a shipment of merchandise like the one aforesaid, passing through Belgian territory in bond in transit merely, was required to remain uninterruptedly in the exclusive, official custody, possession and control of the Customs authorities of the Kingdom of Belgium* (subject to the direction of persons standing in a relationship to such shipments such as Debenham occupied to the shipment in controversy, as to when and where such shipments should be delivered for deportation, as aforesaid), *until the shipment was actually, physically delivered by such Customs authorities, at the instance of the consignee of the shipment, on board the vessel which was to transport it beyond the Kingdom,* unless the consignee of such shipment paid to the Belgian Government the charge and duties due on the shipment, and accepted actual physical delivery and possession thereof.

In pursuance of the directions of Mr. Debenham aforesaid, the car which contained the goods involved in the controversy in this action, shortly after its arrival at Antwerp, was taken by the Customs authorities from the Anvers-Bassin Station to the Entrepot Roval, where, on June 1, 1901, the goods were unloaded from the car and stored in the warehouse, under the exclusive custody and control of the Belgian Customs authorities. Upon receipt of the goods in the warehouse, the Customs authorities delivered to Debenham a document called 'Acquit de Transit', which Debenham was to keep until the moment when the goods were to be removed from the warehouse to the steamer, and to deliver up to the Customs authorities whenever, on his directions, the goods were to be embarked on board of the deporting vessel.

Whenever the goods were to be thus removed, the law required that Debenham should present this document called 'Acquit de Transit' to the Customs authorities, whereupon the latter authorities would issue a 'remise au depart' (release for departure) and send the goods to the deporting steamer, officers of the Customs remaining in custody thereof until the goods were actually and eventually loaded on board, and thereby passed out of the Kingdom. The warehouse charges were paid by Debenham. The transportation charges from the warehouse to the steamer would have been payable by Debenham, and would have been by him chargeable and collectible from Oswald Roth, the shipper aforesaid."

III.

PLAINTIFF IN ERROR SHOULD NOT BE HELD LIABLE AS AN INSURER FOR THE LOSS OF THE GOODS INVOLVED IN THIS CASE, BECAUSE THEY WERE IN CUSTODIA LEGIS, AND NOT IN THE POSSESSION OR UNDER THE CONTROL OF THE PLAINTIFF IN ERROR AT THE TIME OF THEIR DESTRUCTION.

It thus appears from the statement of facts, we think, beyond question or doubt that all parties concerned contemplated and contracted for the transportation of a consignment of merchandise *in bond* to and through the Kingdom of Belgium, and that "shipments of such merchandise could, pursuant and subject to the provisions of said treaty be transported into and beyond the territory" (of the nations through which it passed) only

> "provided that each of the said shipments of merchandise were contained in receptacles that remained sealed, unbroken, and in the *uninterrupted, exclusive and official custody of the Government Customs authorities* of the nations whose territory it was traversing *throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom*" (Statement of Facts, pp. 6 and 7).

It is true that the agent of plaintiff in error at Antwerp, upon the arrival of the consignment there, had the choice of directing the Customs authorities to keep the shipment in its custody either:

1. In the Belgian Governmental Customs Warehouse called the Entrepot Royal; or

2. In Governmental cars on the wharf at which the ship was to receive them, but

> *"In either case the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive, official custody* of the Governmental Customs authorities until actually loaded on board the ship" (Statement of Facts, pp. 9 and 10).

In other words:

The goods arrived in Government Custody at Antwerp; the ship was not ready to receive the goods, and, therefore, it became the duty of Mr. Debenham to indicate whether the goods were to be detained (in the same Government custody) either in Government cars on the wharf or in the

Government warehouse. He preferred the Government warehouse. The goods were taken there and he was given an "Acquit de Transit"—a receipt for goods in transit. Debenham did not issue any bill of lading or paper of any kind covering the goods, because it was legally and compulsorily required of all concerned to leave the goods

> "uninterruptedly in the *'exclusive official custody, possession and control of the Kingdom of Belgium'*, until the shipment was actually physically delivered (at the instance of the consignee of the shipment) by such Customs authorities on board the vessel which was to transport it beyond the Kingdom of Belgium".

The Agreed Statement of Facts, with studious persistence, repeats again and again that shipments of goods (like those here involved) under the provisions of the Treaty, law and regulations referred to could be transported *"in bond"* only, provided that each of said shipments of merchandise were contained in receptacles

> "that remained sealed, unbroken and in *the uninterrupted exclusive and official custody, possession and control of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory and until its final deportation therefrom"* (Statement of Facts, pp. 7 and 12).
>
> "It was the duty of Mr. Debenham to receive and forward such shipments at Antwerp *only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond*

> *for export pursuant and subject to the terms of the International Treaty hereinafter referred to might be received by any one at Antwerp to be thence forwarded under and pursuant and subject to the provisions of said Treaty''* (Statement of Facts, pp. 2 and 3).

The parties fully contemplating the Treaty expressly made arrangements for carriage pursuant and subject to its provisions (Statement of Facts, pp. 3, 4, 6, 7).

The case at bar is a novel one to which the general rules heretofore applied to control the liability of carriers in ordinary cases are not applicable; therefore the court should determine the controversy independently of the old inapplicable rules.

It has been the boast of jurists that our law is progressive, that it is adaptable to new developments in the affairs of men never foreseen in ancient times; that it can and should be applied by the courts so as to do justice to the requirements of changed conditions, notwithstanding ancient and misleading precedents which do not comprehend modern controversies.

It needs no references to show that "arrangements for transportation" in "bond for export", such as controlled the shipment under consideration were not known in early times when the elementary rules of our common law controlling carriers were evolved. The precedents referred to by plaintiff therefore could not have contemplated

such a case as the one at bar. We feel safe therefore in contending that this case is unprecedented, and that it is for the court to determine the rights of the parties, and to adjudge the controversy involved according to justice, as it may appear from the inherent merits of this new case.

As new exigencies arise, the courts should apply the law to do them justice. Declaring this principle our U. S. Supreme Court (in 1873) said:

> "And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern for the occasion for it could not sooner have arisen."
>
> Sawyer v. Hoag, 84 U. S. (17 Wallace), 620.

The shipment of goods under consideration was placed by the shippers *in bond* for transportation by various instrumentalities from Switzerland, *and was to continue in bond* until it was finally embarked on board ship for departure from Belgium. It was in receptacles which remained sealed, unbroken and in the *uninterrupted exclusive and official possession and control of the Governmental Customs authorities* throughout and at every period of time specified in the statement of facts (Statement of Facts, pp. 7 and 12). How then can it be claimed that the goods were in the possession of any one other than the Governmental authori-

ties, and particularly how can it be claimed that the shipment was in the possession or custody or control of defendant? The legal effect of placing the shipment *in bond,* i. e., in the exclusive custody, possession and control of the revenue officers of the Government was to place it in the custody of the law.

> "Where the goods are taken out of the carrier's possession under valid legal process, such as attachment, or execution, and the carrier is obliged to and does deliver them to the lawful authorities of the place where the goods are in *transitu,* or awaiting delivery, or the carrier fails to transport or deliver them because of the lawful order of a court having jurisdiction of the subject matter, the carrier is not liable for non-delivery, the process or order of the court being within the term *vis major.*"
>
> Moore on Carriers, p. 229, and cases cited.

The circumstances of a shipment similarly placed have been fully described by our federal court of last resort, which said:

> "The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the

goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit."

Hartranft v. Oliver, 125 U. S. 525, 528.

The principle declared in this case, clearly shows that it could have made no difference if the shipment had been kept on the wharf in bonded cars, because in that case too they would have been in the same position as if technically in a public store or bonded warehouse.

The shipment was rightfully and forcibly detained and withheld by the Government from all other persons until the Government delivered it out of such exclusive custody, possession and control, according to the provisions of law.

It is true that defendant was in a position to induce the Governmental authorities to deliver the shipment out of their custody, possession and

control in due time, but it is also true that in this case the Governmental authorities in fact at no time permitted the shipment to pass out of their custody, possession, or control, and that the shipment was actually in bond and in every respect in its custody, possession and control at the time when it was destroyed by fire. None of the cases cited on the part of defendant in error relate to such a state of affairs as is presented by a shipment of goods transported *in bond,* and they are therefore not illustrative of the case at bar because there is no analogy in logic or principle between the cases which they comprehend and this case.

The facts of this case, we contend, refute the claim of defendant in error that the shipment was *delivered to or accepted by defendant in error,* unconditionally, or otherwise, as a carrier for any purpose. The facts also show that because the shipment was shipped *in bond* to America, it could not be *delivered* to any one except the Customs authorities, unless and until they were actually and physically placed aboard the departing steamer, and that therefore defendant never became an insurer of the goods.

A consideration of all the cases holding a carrier liable as an insurer shows that each gives the same reason for its conclusion as in Lane v. Cotton, 12 Mod. 472 (482), where Lord Holt said:

> "for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great

equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such an opportunity as they have, by the trust reposed in them, to cheat all people, they would be apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconvenience would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril".

And, in summing up, Lord Holt states that:

"the same reason holds to charge them in this case as to charge carriers, inn-keepers and the like, videlicet, the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would be under to imbezil goods *intrusted to them*, without possibility of proving a particular neglect".

In Coggs v. Bernard, 2 Ld. Raym. 909 (918), the same reason is given, the court stating that:

"The law charges this person, thus *intrusted to carry goods* against all events but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic

> establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would be impossible to be discovered. And this is the reason the law is founded upon in that point."

In Forward v. Pittard, 1 T. R. 27 (33), Lord Mansfield, delivering the unanimous opinion of the court, gives the same reason as his only one for the doctrine. He said:

> "If an armed force come to rob the carrier of the goods he is liable, and a reason is given in the books, which is a bad one, viz.: that he ought to have a sufficient force to repel it; but that would be impossible in such cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil."

Throughout the later cases the restatement of the old basis for the doctrine continues, and it seems the only reason that can be given for it is the policy of the ancient law.

In the case of Nugent v. Smith, L. R. 1 C. P. 19, Brett, J., in stating the responsibilities of a common carrier said:

> "And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common

> carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason; * * * the policy is applied to the trade of common carriers, because *when the common law adopted that policy* the business of common carriers in England was exercised in a particular manner and subject to particular conditions, which called for the adoption of that policy."

In Riley v. Horne, 5 Bing. 217, Best, C. J., said:

> "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property the law has added to * * * a carrier * * * the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the King's enemies."

It is clear, therefore, that this burden is placed on the common carrier, only if and because he has the exclusive custody of the goods. The goods are so entirely under his control that there is no disinterested party so situated that he can be

called upon to show the negligence of the carrier. Since that is true so should the converse be, i. e., when the carrier's custody is not exclusive, the insurance liability should not be thrust upon him.

Insurance liability is so extreme that the courts rigidly confine it to the exact situation for which the law was originally laid down. The business must be carriage, and the courts insist upon two requirements to meet their conception of carriage; first, the carrier shall have possession; second, that the carrier shall transport. Thus bridge proprietors and ferrymen are not insurers as carriers because they do not take possession.

> Kentucky Bridge Co. v. Louisville Ry., 37 Fed. 567;
>
> Dudley v. Camden Ferry Co., 42 N. J. L. 25.

The reasons for the rule holding a carrier liable as an insurer being the reasons above stated by Lord Holt in the case of Lane v. Cotton (approved in the other cases referred to), it follows that the rule is not applicable in cases where these reasons are absent.

It is a familiar principle of law (which we invoke) that when the reason of a rule ceases, the rule itself ceases:

> "When the reason of the rule ceases, so should the rule itself."
>
> C. C., 3510;
>
> Katz v. Walkinshaw, 141 Cal. 116, 123.

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails."

People v. Appraisers, 33 N. Y. 461;

Katz v. Walkinshaw, 141 Cal. 122.

"It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim 'Cessante ratione, cessat ipse lex'. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances."

Beardsley v. Hartford, 50 Conn. 541, 542; 47 Am. Rep. 677.

It is within the knowledge of the court that Treaties between nations for the transportation of shipments of freight through their territory, *in bond in transit for export* are devices of modern origin, and that the relations of carriers under their provisions must necessarily be different from those of olden times in many respects. Cases like the one at bar as well as others of various aspects and complications will arise in course of time. It is important, therefore, that the status of carriers with regard to shipments of freight carried pursuant to such treaties in bond should be deter-

mined. At the very threshhold of all inquiry on this point stands the question whether carriers are to be held as constructive custodians of such shipments, even if the shipments never are within their control but are mandatorily and unquestionably in the exclusive possession, custody and control of the Government authorities. Plaintiff in error being a carrier constantly engaged in the handling of shipments *in bond* is very greatly interested in a determination of the above inquiry, which has not within our knowledge heretofore come up for judicial determination.

IV.

UPON THE WHOLE CASE THE JUDGMENT OF THE COURT SHOULD HAVE BEEN GIVEN IN FAVOR OF THE PLAINTIFF IN ERROR.

We submit that the rules of logic and of sound legal principles—the dictates of justice—should discharge plaintiff in error from liability in a case like this and that judgment should have been given in favor of the plaintiff in error.

V.

THE TRUE MEASURE OF DAMAGES IN THIS CASE IS THE VALUE OF THE DESTROYED GOODS AT THE PLACE OF DESTRUCTION.

We also contend that the District Court erred because it failed to accept the value of the goods

contained in the shipment at *the place of destruction.*

In the case of

Lakeman et al. v. Grinnell et al., 5 Bosw. 625,

the court went very fully into the reasons why this rule should prevail where the goods are lost at the port of departure. In that case the goods had been bought in New Haven, Connecticut, to be shipped to Liverpool, England. They were put on board ship at New York, and were there destroyed by fire before the departure of the vessel. The value of the goods at that time in New York was $4685.27, and in Liverpool $8054.18. Said the court:

> "There is no question on the authorities but that the common carrier who has received goods for transportation and has actually performed the journey or voyage is, in case of non-delivery of the goods, unless the failure to deliver is excused by the act of God, or perils of the sea, liable, as a general rule, for the value or price which they would have brought at the port or place of destination, if they had been delivered according to contract.
>
> The defendant's counsel, however, insists that it would be unreasonable to adopt the valuation at the place of destination, when the goods have never left the place at which they were received by the carrier, but have been destroyed at such place by some cause other than the carrier's own negligence, and insists that in such a case the value of the goods, at the place where they were received by the carrier, is the true rule both in principle and authority."

The court then discusses the case of Wheelright v. Beers, 2 Hall's Sup. Ct. R. 391, in which case the

goods were damaged on a voyage from New York to Omoa, a part of which were sold at an intermediate point, viz, Norfolk, and the rest of which were brought back to New York and there disposed of, and where the court held that the rule for the damages in that case was the loss on the sale of the goods at those two points, and not the price of the goods at the point of destination.

In this regard the court then states:

> "The loss on the sale of the goods at Norfolk, and New York was considered as the true rule as to damages, upon the ground that there was no fault or fraud on the part of the defendant from which the loss arose, and that the case only showed a breach of the implied warranty of seaworthiness."

The court also refers to the case of Dusar v. Murgatoid, 1 Wash. C. C. 13, in which it was held that the measure of damages in a case where the goods were damaged about half their value at the port of departure, was the difference between the prime cost and the charges, and the sales at the place of shipment.

The court then proceeds to examine the reasons which should determine the measure of damages in the case, and said:

> "The true test, I apprehend is what will furnish the plaintiff full indemnity. If the value of the articles according to the invoice price, will fully compensate for the loss, that price should govern. If the value in the place where to be delivered is necessary to furnish complete remuneration, that should be adopted; and

hence the question whether the goods are lost in the place where they are received by the carrier, or in the place where they were by the contract to be delivered, may become one of the last importance. I say *may* become, because I do not say that it is necessarily decisive in all cases; for I can well imagine a case in which the goods are lost in the port of departure, in which, from an impossibility of procuring other articles of the same kind, or from other causes, the value at the port of destination would furnish the only adequate indemnity to the plaintiff. In such a case it ought, except under special circumstances to be adopted. But if the goods could be immediately replaced at the same price, and sent forward by another vessel, it would be unreasonable to give the plaintiff the profits he might have made if the goods had not perished, and the first shipment had been successful.

This furnishes a safe and righteous rule, and divests the question of damages of the penal character which it would have if the good conduct of the carrier were the sole test. This is the reason why, when the vessel has arrived at the port of destination, the value of the missing goods at that place is adopted. No other rule would compensate. So, if the vessel should perform but a portion of her voyage, and the goods are sold or lost by act of the carrier at an intermediate port, as in the case of Wheelwright v. Beers, in 2 Hall's Report, the value at the port of destination might well be given if the plaintiff was unable to replace the goods at the intermediate port and forward them on, as, on the other hand the invoice price which was adopted in that case would be proper if, under the peculiar circumstances of the case that would furnish complete indemnity.

It follows that whether the carrier has been guilty of negligence or fraud is not the only

test, nor whether the voyage has been begun or not; but whether the market price at home, or the price at the port of destination, furnishes the true and perfect indemnity.

* * * In the case now before us the vessel was destroyed by fire, while lying at the wharf, the day after plaintiffs' goods were put on board, and before the day on which she was to have sailed. The question then is, how can the plaintiffs be perfectly indemnified for this loss. Unless, in the absence of proof on the subject, we are to assume that the plaintiff could not, in the port of New York, or by sending to Connecticut, where the goods were purchased, have procured other goods on that day, or within a reasonable time afterwards, of the same quality and at the same price, and further assume that no other means of transportation of the goods to Liverpool could have been procured in this port within a reasonable time of the day on which the Henry Clay would, but for her destruction, have sailed, neither of which presumptions can, I think, be reasonably entertained, we must hold that, so far as the valuation of the goods is concerned, the value in this port, at the market price, was the true measure of damages as giving a full indemnity. * * * And I am not prepared to say that in a case like the present, in which, without any imputation of negligence on the part of the defendants, their vessel was accidentally destroyed by fire within a few hours after the goods were received on board, we should not consider it inequitable and unjust to impose on them a higher rate of damage than the invoice price or home valuation of the goods, if that were not sufficient to give a perfect indemnity. But we are relieved from all doubt on the latter point by the consideration that the goods were lost in the port of New York, between which and Liverpool communication is almost daily,

> and by the fact that there is nothing in the evidence to raise a doubt that the goods might have been immediately replaced at the same price at which they had been purchased."

In the case of

Joshua Barker, 13 Fed. Cases, No. 7547,

the goods were damaged and sold by the carrier before they reached their destination, without notice to the shippers, and the court held that the sale of the goods was tortuous and wrongful, and for that reason the measure of damages was fixed as the price of the goods at the place of destination, the court saying:

> "The libellants were accordingly entitled to charge the claimants the value of the flour laden on the vessel, and not delivered at the port of destination as tortuously disposed of by them."

In Ringold v. Haven, 1 Cal. 108, 119, the court disposed of the point under discussion as follows:

> "Upon this point (the measure of damages in case of this kind) the authorities do not coincide—some jurists of eminent ability holding the price at the place of shipment to be the limit, or, as the case may be, the extent of damages which the plaintiff is entitled to recover,—but we are of opinion that the weight of authority, as well as the reason of the thing is in favor of making the value of the goods at the port of delivery the rule for determining the amount of damages."

The ruling in this case was shortly thereafter reaffirmed in

Hart v. Spalding, 1 Cal. 214.

The case of Ringold v. Haven, supra, is cited with approval in

The Arctic Bird, 109 Fed. 167, 175,

Judge De Haven rendering the opinion, and stating:

> "The freight having been prepaid, the measure of damage is the market value of the goods at the place of destination, at the date when they should have been delivered, with interest from that date. (Citing cases.) The owner is entitled to have the equivalent of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, *less the charges for transportation and delivery.*

Same:

> Northern Commercial Co. v. Lindbloom, 162 Fed. Rep. 250, 255.

> "The measure of damages in this class of cases, where there has been a failure to deliver, is the current value of the goods at the port of destination, with interest on the same. Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for non-delivery. From the date of such non-delivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested in the goods, and should have redress by being allowed legal interest thereon. The tendency of the modern authorities is to allow interest in all cases, and surely this is one in which it ought to be allowed, if in any."

> The Nith, 36 Fed. 86, 96.

We think that upon these authorities defendant in error should have been awarded (if anything)

either the price of the goods at the place of their destruction or their price at the place of their destination *less the cost of transportation to that point.* Of course this court can make provision for ascertaining this cost of transportation.

We urge, however, that, on the merits, the judgment of the court below is erroneous, that the same should be reversed, and that plaintiff in error should have judgment in its favor.

Dated, San Francisco,
May 15, 1915.

Respectfully submitted,

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No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

The Facts and the Pleadings.

A. THE FACTS.

This case was submitted to the District Court upon the agreed statement of facts contained in the transcript, and, upon those facts, that court, after delivering an oral opinion, rendered judgment for the plaintiff.

Although the agreed statement of facts is brief, the following statement, in outline form, of the

salient facts will serve the convenience of the court and facilitate reference.

1. Plaintiff was a San Francisco importing merchant.

2. Defendant, a Canadian corporation, was a common carrier of goods for hire, having a place of business in San Francisco.

3. Defendant maintained an agency in Antwerp in sole charge of one Debenham, who was, and had been for seven years, defendant's European Continental Traffic Agent.

4. It was such Traffic Agent's duty, as such agent, to receive at Antwerp shipments of goods intended to be carried by defendant, subject to customs regulations, and to give directions to the Government Authorities at Antwerp as to shipping the goods on defendant's chartered steamers connecting with its railroad at Montreal.

5. Plaintiff arranged with defendant, at San Francisco, that Debenham, on behalf of defendant, for an agreed rate of freight, was to receive, at Antwerp, all shipments consigned to defendant for carriage from Antwerp to San Francisco. Such shipments had been received by Debenham, and forwarded to San Francisco, for five years prior to the shipment of the thirty-six tubs of cheese here in suit.

6. On May 17, 1901, in answer to inquiries from Oswold Roth, the shipper of the goods in contro-

versy, Debenham wrote him: "Please prepare the cheese so that it may arrive here towards the end of the month; for very probably there will be a sailing for Montreal by the end of the month or on one of the first days of June. I shall have definite news tomorrow or day after, and meanwhile await my advices before shipping."

7. On May 20, 1901, Debenham wrote to said shippers: "Confirming mine of the 17th inst. I take pleasure in advising you that the Steamer 'Sardinian Prince' will sail on June 5, and I request you therefore to forward to me the lot of cheese to 'Antwerp South Transit' station to arrive not later than June 3."

8. On May 22, 1901, Debenham advertised in an Antwerp daily paper, as agent of the Canadian Pacific Railway Company, that the Steamer "Sardinian Prince" would sail on June 5, 1901.

9. On May 24, 1901, Debenham wrote to said shippers: "Please let me know by return mail if you will act on my letter of the 30th inst."

10. On May 25, 1901, the goods in question were loaded on a car at Uster consigned to forwarders at Bale.

11. On May 28, 1901, the car containing the goods arrived in Bale and was forwarded to Debenham, who was the consignee in the way bill for the shipment.

12. On May 29, 1901, the car containing said goods arrived at the Belgian frontier, and was re-

ceived by the Belgian State Railway, which took it to Antwerp.

13. On May 30, 1901, the car containing the goods arrived at Antwerp.

14. Debenham was at once notified of the arrival of the car in Antwerp, by the railway authorities, who delivered to him the way bill which accompanied the shipment.

15. Debenham then had the option:

(a) Of directing the officials to take the goods directly to the ship on which they were to be loaded.

(b) Of directing the officials to take the goods to the wharf, there to remain until he should direct them to be placed on board the ship.

(c) Of directing the officials to take the goods to the Customs Warehouse (Entrepot Royal) there to remain until he should direct them to be removed and taken to the ship.

(d) Of paying to the Belgian Government the charges and duties due on the shipment and so dispensing entirely with further customs surveillance.

16. Debenham directed the officials to take the goods to the Customs Warehouse (Entrepot Royal), the ship not being ready to receive them.

17. On June 1, 1901, pursuant to said directions of Debenham, the goods were unloaded and stored in the Customs Warehouse (Entrepot Royal).

18. Upon receipt of the goods in the Entrepot Royal, the customs authorities delivered to Debenham a document called "Acquit de Transit", which he was to keep until he desired the goods to be removed from the Entrepot Royal to the steamer, and then re-deliver to them whenever he wished to embark the goods on shipboard; whereupon the customs officials would issue to him a "remise au depart" (release for departure) and send the goods to the deporting steamer.

19. On Saturday, June 1, 1901, the steamer "Sardinian Prince" arrived in Antwerp, and on Monday, June 3, 1910, she began to load her cargo.

20. On June 5, 1901, at 2:36 P. M. an accidental fire destroyed the Entrepot Royal and the goods.

21. Debenham did in fact secure a "remise au depart" for the goods before their destruction.

22. Debenham paid the Customs Warehouse (Entrepot Royal) warehouse charges.

23. The transportation charges from the Entrepot Royal to the steamer would have been payable by Debenham, and ultimately charged to the shipper.

B. THE PLEADINGS.

By reference to the pleadings, it will be seen that the facts in the agreed statement are in strict accord with the facts alleged in plaintiff's complaint; and,

in the light of the agreed statement of facts, the only issue presented by defendant's answer to the complaint is whether or not the goods in question had been delivered to and accepted by defendant for immediate transportation, prior to their destruction by fire.

It will be noted that, while the answer asserts that the San Francisco agreement contained conditions that no shipment would be received at Antwerp except when placed alongside of ships, to be designated by the defendant, then and there ready to take such shipments on board, and that defendant should not be liable for any damage to or destruction of shipments by fire, either on sea or land, nevertheless those affirmative allegations are wholly unsupported by the agreed statement of facts, and hence remain unproved.

As intimated above, the sole issue presented by the pleadings and the agreed statement, is, as pointed out in the opinion of the Hon. Wm. C. Van Fleet (Transcript 27, 29), whether or not there was a delivery of the goods in controversy to defendant for transportation prior to their destruction—whether they were, at that time, in its possession as a common carrier rather than as a warehouseman.

II.

Defendant's Liability as a Common Carrier.

A. DEFENDANT, AS A COMMON CARRIER, WAS LIABLE FOR DESTRUCTION OF THE GOODS BY FIRE.

This proposition is so elementary as to require no consideration; and, in fact, it is admitted by defendant.

The whole case revolves upon the single question, considered under the next heading, whether the goods, at the time of their destruction, were in the possession of the defendant as a common carrier. Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not.

B. DEFENDANT'S LIABILITY AS A COMMON CARRIER COMMENCED ON DELIVERY OF THE GOODS TO, AND ACCEPTANCE THEREOF BY, IT FOR IMMEDIATE TRANSPORTATION.

The law is well settled as to when the liability of a common carrier of goods commences:

> "The liability of the common carrier commences whenever, and as soon as the goods have been delivered to and accepted by him solely for transportation, although they may not be put immediately in itinere, but are, at first, *for his own convenience and preparatory to the voyage for which they were intended,* temporarily deposited in his wharf or store-room. In such case the deposit is a mere accessory to the carriage, and does not postpone his liability as a common carrier to the time when

they shall be actually put in motion towards their place of destination."

Hutchinson, Carriers, Sec. 113.

"The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception, when they are in fit and proper condition and ready for immediate transportation. If a common carrier receives the goods into his own warehouse for the accommodation of himself and his customers, *so that the deposit there is a mere accessory to the carriage,* and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods."

Moore on Carriers, 1st Ed., page 130.

"When the goods are detained or delayed awaiting shipment, through the carrier's act or to suit its purpose or convenience, *and not on account of or by the request or act of the owner or shipper,* the relation and liability is that of a common carrier, and not of a warehouseman."

Moore on Carriers, 1st Ed., page 260.

"The responsibility of a common carrier, therefore, is fixed by the acceptance of the goods, whether the acceptance be in a special manner or according to the usage of his business."

Angell on Carriers, Sec. 140.

See also

Authorities in defendant's brief, pp. 13-17.

Even where the carrier is also engaged in the business of warehouseman:

> "In such a case, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, *if they are deposited for the purpose of being carried without further orders,* the responsibility of the carrier begins from the time they are received: Angell on Carriers, secs. 75, 131. So of an innkeeper, who is also a carrier by land; if he receives goods into his inn to be carried, he is liable as a carrier for any loss which may happen before they are put in transit: Id. sec. 133; Hyde v. Trent etc. Nav. Co., 5 T. R. 389."
>
> *Blossom v. Griffin,* 13 N. Y. (3 Kernan) 569.

See also

> *Wade v. Wheeler,* 3 Lansing (N. Y.) 201.

And, of course, it is immaterial whether the carrier deposits the goods in his own warehouse or in that of a third party, for the carrier's convenience, or as an accessory to the carriage. This is made very clear in a thoroughly considered case, in which cotton had been delivered to a compress company employed by the defendant carrier:

> "* * * for there was other evidence from which the jury might have found that the employment of the compress company was for the purpose of facilitating the transportation by reducing the bulk of the cotton, and was an expedient whereby the railway company could more easily earn the stipulated freight than if it should transport it in its larger bulk. *If it was done for the convenience of the railway*

> *company, or mainly for its convenience,* it surely would not be unreasonable to find that during the time the compress company had the possession it was holding it *as agent or employe of the railway company.*"
>
> *Southern Railway Co. v. Hubbard Bros.,* 146 Fed. 31 (C. C. A.) (Appendix A).

See also

> *Otis Company v. Missouri Pac. Ry. Co.,* 112 Mo. 622.

On pages 17 and 18 of its brief respondent seems to contend that a deposit of goods is to be deemed accessory to the carriage of them, only when the deposit is in the carrier's "own warehouse or place of keeping." This is not sound, and is refuted by the above cases. If a carrier's own warehouse is full, and for its own convenience it has goods, delivered for immediate carriage, deposited in another's warehouse, paying for the privilege, there can be no doubt that such deposit would charge the carrier as effectively as if it had been made in its own warehouse. And whether the depository selected by the carrier be the warehouse of a private third party or of a public third party is not material.

In the case at bar the carrier's own "place of keeping" (the "Sardinian Prince"), was not conveniently ready to receive the goods; therefore the carrier, for its own convenience, elected to deposit them in the Entrepot Royal, and pay therefor.

But it could not, and did not, by so doing, divest itself of its obligation as a common carrier.

We now proceed to consider the facts in the case at bar, and to show that they clearly show a delivery of the goods to the defendant for immediate transportation, which is far within the limits of the test prescribed by the above authorities.

1. *The goods were* DELIVERED *to defendant as a common carrier for immediate transportation prior to their destruction by fire.*

(a) Debenham was the "European Continental Traffic Agent of defendant. It was his duty "to receive at Antwerp * * * shipments of merchandise coming there in bond for export," and "*intended to be transported* by said defendant carrier". By the agreement made between plaintiff and defendant at San Francisco it was particularly his duty "to receive and *cause to be embarked* at Antwerp * * * all the shipments of merchandise consigned to defendant *for carriage* from Antwerp to San Francisco."

It was no part of Debenham's duty to shippers in general, and it was wholly contrary to his duty to plaintiff under the San Francisco agreement, for him to receive goods for *storage* or *warehousing*. He could not receive goods except such as were *"intended to be transported"* or *"for carriage*. He was not to receive goods and cause them to be warehoused; he was "to receive and *cause to*

be embarked''. When any shippers sent him goods, such was his custom and authority that they could only intend that it was for immediate carriage. If goods were warehoused, it was for the defendant's own convenience and purposes, as is shown beyond question by the fact that any *warehouse charges were payable by Debenham,* and not recoverable from either shippers or buyers. Transportation charges, on the contrary, both from Antwerp to San Francisco, and from the Customs Warehouse (Entrepot Royal) to the ship, were payable by the shippers or the buyers. This fact is conclusive proof, that, when goods were deliver to Debenham at Antwerp, it was solely for *immediate carriage,* since, if he chose, for the defendant's convenience or purposes, to store them, the expense of so doing was payable by him as agent of defendant—was just as much an expense of transportation upon defendant, *in earning its freight,* as would have been the cost of renting a freight car from a third party (see *Wade v. Wheeler,* 3 Lans. (N. Y.) 201).

Referring now to the particular goods here in suit: Debenham's letters to the shippers, of dates respectively May 17 and May 20, 1901, in answer to their inquiry of May 11, 1901, very obviously request the cheese to be forwarded to him, not that it may be warehoused, but *that it may be shipped* —"for carriage". In the first letter he asks that it be prepared so that it will arrive near the end of the month, *because* there will probably be a

sailing. So concerned is he that the cheese shall be sent "for carriage" that, in the same letter he instructs the shipper to "await my advices before shipping." In the second letter he advises the shippers that the vessel "will sail on June 5, and I request you *therefore* to forward to me the lot of cheese." He impressed it upon the shipper that defendant was not soliciting goods for warehousing, but "for carriage", and that it desired as small a lapse of time between receipt of the goods for carriage and the loading of them as it was possible to secure. This, no doubt, was due to the defendant's desire to avoid paying warehouse expenses and to save all possible expense in earning its freight. The advertisement which Debenham placed in the Antwerp daily paper solicits goods to be delivered "for carriage" and not for warehousing. The waybill indicated that the shipment was in bond "*in transit to the United States*". It is very apparent that both defendant and the shippers contemplated and assumed that the goods were to be *continuously in transit,* and never out of it for warehousing purposes; and this assumption on the shippers' part was rooted in the conduct and representations of the defendant. Neither defendant nor shippers, at any time, contemplated any relationship of defendant to the goods other than that of common carrier. The reason why the goods were warehoused is stated in defendant's brief, page 28, to be that "the ship was not ready to receive the goods, and, *therefore,* it became the

duty of Mr. Debenham to indicate whether the goods were to be detained * * *."

That the goods were, in fact, delivered to defendant by delivery to its authorized agent, Debenham, seems evident. They were consigned to him in the way bill covering the transit from Bale to Antwerp, in accordance with the arrangements between plaintiff and defendant. On May 30, 1901, the goods arrived in Antwerp, and the station authorities notified the consignee, Debenham, of their arrival. Down to this point there had been no delivery to defendant or Debenham; and, rightfully or wrongfully, he might have refused to have anything to do with them, passively leaving them with the next preceding carrier.

(b) But then, on the same day, the railway authorities *"delivered to him the way bill accompanying the shipment."* The way bill gave Debenham the right to place the goods on board his ship at once, or to have them placed on the wharf, or to have them warehoused, in any of which contingencies he would have to pay no duty (Tr. 18, 19). And Debenham, of course, like any consignee of goods, had another alternative: to pay the duty on the goods, whereupon he could have withdrawn them wholly from all customs surveillance, without placing them on ship board. He then had the power to control the disposition of the goods in accordance with the business arrangements of defendant. The shipper of

the goods had done all that he was requested to do by Debenham, in the letter of May 20; had parted with the control of the goods, and had placed them in the exclusive care and control of Debenham and defendant in a foreign country, where, so far as appears, the shipper was wholly unrepresented. (See *Hutchinson,* sec. 141; *R. R. Co. v. Manufacturing Co.,* 16 Wall. 327, quoted infra). The goods were ready for immediate transportation; the shipper had no possible reason for desiring them to be stored or delayed; and any storage or delay was purely for the convenience and purposes of the defendant and a mere accessory to the carriage, contrary to the shipper's reasonable expectations, and, it must be assumed, against his desires. Debenham now had the right, the power and the duty to control their disposition without consulting the shipper. The manner in which he disposed of them was wholly independent of any control of the owner or shipper, and was dependent solely upon the business convenience and pleasure of the defendant. There had been a complete delivery to defendant as a common carrier, through its Traffic Agent, Debenham.

See

North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426 (Appendix B);

Aetna Ins. Co. v. Wheeler, 49 N. Y. 616;

Wade v. Wheeler, 34 Lansing (N. Y.) 201;

Blossom v. Griffin, 13 N. Y. (3 Kernan) 569.

(c) But, even assuming that the delivery of the way bill to Debenham did not, of itself, constitute a delivery to the defendant; nevertheless, when he directed the officials to take the goods to the Customs Warehouse—so exercising his *jus disponendi* over them, there was, without doubt, a delivery to him. Had he been the buyer and ultimate consignee of the goods, that act of dominion would surely have constituted a delivery to him, relieving the former carrier of all further responsibility, and satisfying the shipper's obligation to him. And, equally, it constituted a full delivery to defendant, for carriage, through Debenham.

(See cases heretofore cited.)

(d) Assuming further, however, that the delivery of the way bill and the act of dominion under (c) did not, even together, amount to a delivery to Debenham; yet, when, on his order, the goods had been deposited in the warehouse, on June 1, 1901, *the very day upon which, at noon, the ship arrived in Antwerp,* and he received from the warehouse the "Acquit de Transit", there was a delivery to him and to defendant.

(See cases heretofore cited.)

(e) Assuming yet again, that, even down to this point, there had been no delivery; certainly when Debenham, after the arrival of the ship in Antwerp, surrendered the "Acquit de Transit", which operated as an instruction to the customs officials to send the goods to the departing steamer,

and received, in exchange, the "remise au depart" *and paid the warehouse charges,* there can be no doubt but that the goods had been delivered to him, as agent of the defendant. By paying the warehouse charges, he admitted that the goods had been delivered, and that they had been stored to suit defendant's convenience. (See *Wade v. Wheeler*). Not only had they been delivered to defendant, but, through Debenham, it had actually exercised its *jus disponendi* at least twice. No word had been sent to the shipper that defendant refused to accept the goods, and the shipper did not know but that they were on board the ship. He was justifiably and naturally resting assured that the goods were in their continuous transit to San Francisco.

See

Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. App. 386 (Appendix C);
C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285;
Hutchinson, sec. 755.

These several acts of Debenham will be further discussed under the subsequent headings; but it is submitted that, to this point, it has been conclusively demonstrated that there was a *delivery* of the goods to the defendant as a common carrier, for immediate transportation, prior to their destruction by fire in the warehouse in the middle of the afternoon of June 5, 1901—*the very day upon which defendant, in the letter of May 20 and the*

newspaper advertisements, had represented that its ship, for which it had solicited the goods, would sail.

(f) We have no disagreement with the principles relating to delivery for carriage expressed in defendant's authorities cited in its brief under heading I, pages 12 to 20; but we do disagree with the construction placed upon some of those authorities by defendant, and with the manner in which defendant applies them to this case.

On page 14, in a quotation from Hutchinson, Sec. 4, the word *"law"* is emphasized as one of the causes of loss against which a common carrier is not an insurer. That exception has no bearing in the case at bar, for by no possibility can it be said that the loss here in question was *caused by the law*. Nor is this a case subject to the application of the principle, quoted from the same author, on page 32; for the goods here, so far from being "taken out of the carrier's possession" by legal process, were, by the carrier, *voluntarily delivered to the customs authorities for the carrier's convenience*. The Belgian Government had no desire to be troubled with the surveillance of these goods; it was ready and willing—indeed desirous—that defendant should take the physical custody of them *at once*. There was never any order or process of the Belgian Government which prevented or delayed the transit of the shipment for an instant.

As to the excerpt from *Moore on Carriers,* defendant's brief, page 14, we desire not only to express our assent to the proposition as stated, but to particularly call to the attention of the court the fact, there expressed, that a carrier is an insurer of property "*while in its custody* OR *under its control* as a common carrier." So, though the physical *custody* of the property may be in another, if it is *under the control,* or *in the legal possession* of the carrier, the carrier occupies toward it the relation of insurer.

The principle expressed in Hutchinson, page 101, defendant's brief, page 14, is correct; but it is to be borne in mind that the carrier becomes responsible as an insurer when, *in the contemplation of the law* there has been a delivery to and an acceptance by it. It is not for the carrier to say that there has or has not been a delivery or an acceptance; *for if the law says there has been,* it is not material what view the carrier may take of the transaction.

The quotation from Hutchinson, Secs. 105 and 82, defendant's brief, pages 14 and 15, is also unobjectionable when properly construed as a whole. It is true, as there expressed, that the delivery to the carrier "must be complete, so as to put upon him the exclusive duty of seeing to their safety," but the word "exclusive", as appears from the paragraph as a whole, is used merely with respect to *the carrier's relation to the shipper.* In other

words, the word "exclusive" as here used means only that the duty referred to must rest wholly on the carrier *as between the carrier and the shipper,* and that no such duty must remain on the shipper. This excerpt does not contemplate, at all, any custody or supervision by servants of the carrier, or by customs authorities, of goods in the legal possession of the carrier. And, in any event, Debenham, in the case at bar, had the exclusive duty of seeing to their safety; the Belgian customs authorities had *only the duty of seeing that they were not disposed of contrary to the Belgian revenue laws.*

These remarks apply also to the paragraphs quoted from Moore, defendant's brief, page 15, from Hutchinson, defendant's brief, pages 15 and 16, and from the Nebraska case, defendant's brief, pages 16 and 17. The words "exclusive control" and "entire custody" have reference to the control or custody *as between the carrier and the shippers, and have no relation to any custody, control or supervision by a third party.*

Referring to the italicized passage from Angell, Sec. 140, defendant's brief, page 15, it is submitted that the facts here involved show, with unusual clearness, the intention on the part of the shipper "to trust the carrier with the custody of the goods"; and, in addition, that the carrier, for its own convenience, saw fit to *delegate such custody* to the Belgian customs authorities (see Hutchinson, Sec. 141).

The facts here show a delivery by the shipper to the carrier, which was *"in legal effect a complete surrender to him of possession and custody"*, as herein pointed out. These facts, therefore, exactly meet the requirement quoted from Hutchinson, defendant's brief, page 16; they also square perfectly with the requirement that "all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished", defendant's brief, page 16. *There was absolutely nothing remaining for the shippers to do,* in connection with the goods in question, after they left Ulster; they had perfected all arrangements for the passage of the goods through to Antwerp and delivery there to the defendant. Had no fire occurred, or had the goods not been placed in the Entrepot Royal, the shippers would have done no further act toward their delivery to defendant. Had it not suited the *convenience of the defendant* to place the goods in the Entrepot Royal, they never would have entered it.

The test of whether or not the shippers have abandoned all control over the goods, and there has been a delivery to the carrier, is well phrased as follows:

> "* * * It will be found ordinarily to resolve itself into the inquiry: whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances."
>
> *2 Redfield on Carriers,* 70.

There was no *conditional* surrender by the shipper, but an *absolute* surrender. The acceptance by the defendant was also *unconditional.* And it is again to be noted that the quotation from the Nebraska case, defendant's brief, page 6, relates only to an unconditional surrender *as between shippers and carrier; and does not involve any question of customs supervision.*

Referring to the quotation from Moore, defendant's brief, page 15, it is to be remarked that the requirement there phrased is that "it is essential that the property should be placed in such a position that it *may* be taken care of by the agent or person having charge of the business of the carrier." Such person, in the case at bar, was Debenham; and the shipment was placed in such position that it "*may* be taken care of" by him. *And he did, in fact, take care of it.*

It is also to be noted that Moore recognizes that it is not essential that there should be an *actual* delivery, as he points out that a *constructive* delivery is sufficient. In the present case there was more than a constructive delivery; there was an *actual delivery in fact,* and if defendant's possession later became constructive, it was for its own convenience and by its own act.

The excerpt from the case of *H. L. Edwards & Co. v. Texas Midland Co.,* defendant's brief, page 17, also shows, as does the quotation from Moore, above mentioned, defendant's brief, page 14, that "it is not necessary that the carrier must have *both*

possession *and* control of the goods at the time of their destruction, but possession OR control." As shown herein, the carrier in the present instance had *both* the *legal possession and control* of the goods when they were destroyed by fire, at which time they were not only constructively, but actually in transit. The shippers had neither, nor even *custody,* and the Belgian customs officials had only the *nakel physical custody, without either possession or control;* and this bare physical custody they held on defendant's request and for its benefit.

Nothing in this case "required either by law or the contract remained to be done by the shipper" (defendant's brief, page 18) at the time when the fire took place. Prior to that time the goods had been delivered into the "exclusive control of the carrier and accepted by the latter in that character for transportation" (defendant's brief, page 17).

The case of *St. Louis etc. Ry. v. Commercial Ins. Co.,* 139 U. S. 223, 237, quoted from in defendant's brief, page 18, is not analogous to the case at bar; for there the carrier had *in fact* assumed no custody or control *of any of the cotton nor of the place where it was kept* by the Compress Company. It had *done no act whatever* with relation to the cotton in question:

> "This cotton, certainly, was in the exclusive *possession and control* of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no

> *custody or control* of it, *and no possession of it, actual or constructive;* and *no hand in placing or keeping it where it was.*"
>
> *Id.* at p. 237.

On the other hand, another case involving a Compress Company, decided by the Circuit Court of Appeals for the Sixth Circuit *fifteen years later* than the above case, presents facts quite analogous to those here involved, and is decided in accordance with our contentions. The case referred to is *Southern Railway Co. v. Hubbard Bros.,* 146 Fed. 31 (1906) (Appendix A). To the same effect is the case of *Otis Company v. Missouri Pacific Ry. Co.,* 112 Mo. 622.

2. *The goods were* ACCEPTED *by defendant as a common carrier for immediate transportation, prior to their destruction by fire.*

It has been shown that the goods were delivered to defendant as a common carrier for immediate transportation, and, incidentally, that they were by defendant accepted for that purpose. We now consider that acceptance more particularly.

When the goods arrived at Antwerp and Debenham was notified of that fact, rightfully or wrongfully, he might have refused to accept them, notwithstanding his letter of May 20th, and the advertisement. It is conceivable that, disregarding his own solicitation of the goods, he might have wired to the shipper, "I am not ready to receive

these goods as yet as a common carrier; therefore you must continue to control them and dispose of them as you deem best until they are actually on board our ship." And had the shipper, on receipt of that information, taken control of the goods, by accepting the way bill, it could not be contended that there was any acceptance of them by the defendant. The *jus disponendi* would have been in the shipper. *But Debenham took no such course.* Had he done so, the shipper might have chosen to leave the goods in the custody of the Belgian railway, or he might have chosen the wharf instead of the Entrepot Royal as a place of deposit, in which case the goods would not have been destroyed. Or the shipper might have chosen to pay the duty and place them elsewhere, free of all customs surveillance. On Saturday, June 1, 1901, *the ship having arrived at noon,* the shipper might have chosen to have them placed on board at once, *instead of unloading and storing them, on the same date.* The shipper might well have elected to load them on board on Sunday, or Monday, or Tuesday, or Wednesday, instead of allowing them to lie in the warehouse.

And at the least, the shipper, being so informed that defendant, contrary to its solicitations, refused to accept the goods, would have had the opportunity of procuring insurance against loss by fire during the delay of the goods in Antwerp, *and so filling in*

the gap left by defendant's withdrawal of its contemplated common carrier's liability.

See

Hutchinson on Carriers, Sec. 755;

Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. App. 386 (Appendix C);

C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285.

But the shipper was not given the opportunity of doing any of these things. On the contrary he supposed, and correctly, that the goods were in continuous transit, and that he was amply insured by the common carrier's liability.

> "There is a clear *distinction* * * * between property in a situation to be delivered over to the consignee on demand and *property on its way to a distant point to be taken thence by a connecting carrier.* In the former case it may be said to be awaiting delivery; in the latter to be *awaiting transportation.*"
>
> *R. R. Co. v. Manufact'g Co.,* 16 Wall. 327.

> "The owner of goods who delivers them under a contract of shipment to a carrier for transportation over two or more connecting lines *does not contemplate a contract of storage. His contract is for carriage,* and until the goods reach their final destination, he has a *right to continuous carrier's duty and responsibility, which cannot, without his consent,* be changed to the duty and responsibility of a warehouseman, however convenient such a course may be for the carrier. *Wehman v. Ry.,* 58 Minn. 22; 59 N. W. 546."
>
> *Hutchinson, Carriers,* Sec. 141.

> "The owner *loses sight of his goods* when he delivers them to the first carrier and has no means of learning their whereabouts till he or the consignee is informed of their arrival at destination. At each successive point of transfer from one carrier to another they are *liable to be placed in warehouses,* there perhaps to be delayed * * * and *exposed to loss by fire or theft, without fault on the part of the carrier* or his agent * * *. As a general rule the storing of the goods under such circumstances should be held to be a *mere accessory to the transportation,* and *they should be under the protection of the rule* which makes the carrier *liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route.*"
>
> *Hutchinson, Carriers,* Sec. 141.

Even had the shipper been present and noted every move made by Debenham, his conviction would only have been confirmed. For Debenham, so far from refusing to accept the goods until his ship was ready, *took the way bill,* the symbol of the goods. This was an acceptance, under his duty and his solicitations, for carriage (*Wade v. Wheeler; Aetna Ins. Co. v. Wheeler, etc.*). Having the duty to accept only for carriage, and having requested the goods for that purpose, any acceptance by him, in the absence of notice to the shipper to the contrary, could be, and was, for no other purpose. If the vessel which was to carry the goods from Antwerp had been ready to receive them, Debenham could have at once ordered them on board.

If he or his ship did not then take immediate physical custody of the goods, it was simply because it was not convenient for defendant to so do. He immediately had full control over the goods, save that they were, at his option, under the surveillance of the customs authorities for the purpose of preventing disposition of them in Belgium without the payment of duties. Not being ready to place the goods immediately on the ship, *Debenham gave orders for warehousing them.* Having accepted the way bill, which gave him control of the goods, he thus deliberately exercised that control. The goods were never, against his will, taken out of his hands by the customs officials. On the contrary, wholly in accordance with his will and upon his voluntary exercise of it, the goods were placed in the Entrepot Royal, as he directed. *He was dealing with them in a manner absolutely inconsistent with non-acceptance.* Apart from the powers to accept them immediately and bodily on board of his ship, and the power to pay the duty and take them from all customs surveillance on land (both of which he *voluntarily* chose not to exercise), he had the choice of several modes of disposing of them, while on Belgian soil, under customs regulations. After he had elected to accept the way bill, and not to leave the goods in the custody of the Belgian railway to be disposed of as it saw fit, he had the option of directing the officials to take them to one place or another place, according as he desired. In either case they were to

remain in the place to which he directed them only *"until such time as he should direct them* to be taken to the ship" (or, of course, until such time as he should pay the duty), which means *until such time as it should suit the convenience of the defendant* to itself take actual and physical custody of them. As it was not convenient for defendant's ship then to receive the shipment, Debenham, in the free exercise of his opinon, directed the officials to take it to the Entrepot Royal, and to keep it there "until he notified the customs authorities that the vessel which was to receive the shipment was ready to receive and embark the shipment for export." *When* that time would arrive depended entirely upon the business arrangements and business convenience of defendant. The point of time when defendant could itself take physical custody of the goods *could be fixed at its own pleasure.* No one, not even the customs officials, had any control over the defendant in fixing the moment when defendant would itself assume physical custody; for whenever the customs authorities were notified by Debenham to that effect, it was their *"duty"* to transport the shipment from the Entrepot Royal to the point selected by Debenham. "* * * persons standing in a relationship * * * such as Debenham occupied to the shipment in controversy, had the *right* to direct such Governmental customs authorities *when* and *where* such shipments should be delivered for deportation."

When, therefore, "Debenham directed the railroad customs officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the "Entrepot Royal" (assuming that his acceptance of the way bill had not constituted an acceptance of the goods), he accepted possession of the goods for defendant *in the manner and at the time which best suited defendant's convenience.* He could have exercised his right of possession, without surveillance, by keeping them in the custody of defendant's ship, or by paying the duty and keeping them where he pleased, if the convenience of defendant had not dictated that he surrender the temporary physical custody thereof to the customs authorities, *with a continuous right and power to recall the goods into its own physical custody at any moment.* By directing the goods to be taken to the Entrepot Royal, if not on his acceptance of the way bill, Debenham accepted delivery of the goods for defendant; thereafter they were continuously in the legal possession of defendant, and the fact that defendant, for its own convenience, delegated the physical custody of them temporarily to some one else who had a convenient warehouse, did not deprive defendant of the legal possession. While possession is often accompanied by physical custody, the fact that the physical custody is in one party does not militate against the fact that the possession, with its concomitant responsibilities and benefits, is in another party; and this applies particularly to the present case,

where the defendant parted with the physical custody *only for its own convenience, and could reacquire it at any time and place, at its own pleasure.* For an obligor cannot, for his convenience, shift an obligation of his own to another without the assent of the obligee.

And not only did Debenham, after accepting the way bill, direct the goods to be taken to the Entrepot Royal; he accepted the "Acquit de Transit"; and thereafter he presented this document to the authorities, who thereupon delivered to him a "'remise au depart' (release for departure)", which he accepted. And, by presenting to the authorities the "Acquit de Transit", he directed that the goods be taken to the steamer, since, upon such delivery of the "Aquit de Transit", the authorities "would issue a 'remise au depart' (release for departure)" *and send the goods to the departing steamer.* Thus, from the time he accepted the way bill to the time the goods were destroyed, Debenham voluntarily had the *jus desponendi* over them, and continuously exercised it. Had defendant been the buyer and ultimate consignee of the goods, as remarked before, it could not be doubted that these acts would have constituted an acceptance of the shipment by it, relieving the former carrier of its common carrier's liability and placing all further risk upon defendant. Had such been the case, defendant would have been its own insurer; but, the goods having been delivered for immediate carriage, defendant, as a common carrier, imme-

diately upon such acceptance, became plaintiff's insurer.

Debenham did not, in his letters of solicitation, request the shipper to ship the goods to a warehouse in Antwerp, nor to anyone as agent for a warehouse, but "to send *me*", to "forward *to me.*" There was never any agreement or understanding, express or implied, that he should warehouse the goods at any time. The whole course of dealing between the parties, as remarked under the discussion of the delivery to defendant, negatives any understanding other than that the goods were accepted for the sole purpose of *immediate carriage.* The warehousing of the shipment at Antwerp was a mere incident of receiving them in one of the ways in which defendant could receive them under the revenue laws of Belgium; *it was purely accessory to their transportation on defendant's lines.* After Debenham received the way bill there was nothing further to be done either by plaintiff or the shipper. The latter had sent the goods consigned to Debenham, in accordance with his request. They arrived within the time specified—"not later than June 3". The agreement to carry them certainly implied an agreement to accept them for carriage within that time. When they arrived, on May 30, Debenham was bound to accept them exclusively *for transportation.* No matter what method he then pursued, for defendant's convenience, in accepting them, they were now entrusted to defendant *for transportation.* Whether they were at once

placed in the hold of the "Sardinian Prince" or whether they were deposited on the wharf awaiting the arrival of that ship, or detained on the wharf until the arrival of another ship, or a second voyage of the "Sardinian Prince", or whether they were taken to a warehouse, public or private, *their transportation over defendant's routes had commenced.* If defendant, for its convenience or business pleasure, chose to have them journey to the Antwerp warehouse and then, figuratively speaking, "mark time" therein on the way to their destination, they were none the less traveling on the voyage from Antwerp to San Francisco, under the care and in the possession of defendant. Debenham was not detaining the goods in the warehouse for further directions to be received from the shipper or from plaintiff; for, as far as they were concerned, the shipment was launched en route to its destination, entrusted to the care of *carriers for transportation.* There had been a delivery and an acceptance, not for future carriage, but for *immediate carriage.*

3. *The goods were delivered to, and accepted by, defendant* ACCORDING TO THE CUSTOM AND USAGE OF THE PORT OF ANTWERP.

Bearing in mind the several courses which were open to Debenham on arrival of the goods in Antwerp, viz:

(a) To passively leave them in the hands of the preceding carrier;

(b) To pay the duty and do with them as he pleased;

(c) To load them at once on shipboard;

(d) To have them taken to the wharf;

(e) To have them taken to the warehouse;

it is very evident that, in choosing the last method, he, as agent for defendant, accepted them in the, or a, customary and usual way in which such goods were ordinarily accepted at Antwerp under similar circumstances.

> "No rule is better settled than that delivery must be according to the custom and usage of the port."
>
> *Constable v. National Steamship Co.,* 154 U. S. 51 at 63.

See

> *Angel on Carriers,* Sec. 140 (defendant's brief, p. 15).

In that case goods which had arrived in a steamer in New York were still on the wharf, subject to the customs regulations, and were destroyed by fire. Both the opinion of the court, and the strong dissenting opinion, take it for granted that the goods were, under such circumstances, in the possession of the company holding them, subject to the customs surveillance, as a carrier.

In *The Seguranca,* 68 Fed. 1014, oil was to be delivered by the carrier in lighters at Rio "at shippers risk", and the local regulations *required it to be placed in the custody of customs house offi-*

cers until the duties were paid. Judge Brown held that, under the regulations and customs of the port of Rio, the ship had delivered to the consignees when it had placed the oil in lighters, *in the hands of the customs authorities.* He points out that, not only had the parties expressly agreed that the lighterage should be at "shipper's risk", but that the ship *"had no control over the custody or delivery"* of the oil when it had been turned over to the customs authorities. The control over such custody, and the delivery of the oil, was in the consignees, who had the control over both the *custody* of the oil, and over its *delivery.* In short, it is obvious from the opinion that the consignees had the *legal possession* of the oil in that case, as distinguished from the *bare custody* of it, which was in the customs officials. There the consignees could terminate that custody at any time and procure delivery at any place they desired. They were in precisely the relation to the oil that Debenham was to the cheese. From Judge Brown's careful opinion it is clear that had the ship had the *"control* over the *custody and delivery"* of the oil, it would have been responsible, as carrier, for all loss of or to it until actually in the consignee's hands. In the present case defendant having had exactly that *"control over the custody and delivery"* of the cheese was responsible for it as a common carrier at the time of its destruction by fire; for Debenham was the consignee of it, and had actually exercised that control.

In the case of *The Asiatic Prince,* 95 Fed. 343, affirmed in 108 Fed. 287, it was also held that delivery to customs officials, at the end of the transit, according to the custom of the port, is good delivery to consignee, as between the carrier and the shipper. Applied to the case at bar, the delivery to the Antwerp customs warehouse by the railway company carrying from Switzerland to Antwerp, would have been good delivery to Debenham and defendant, without actual delivery of the way bill to Debenham, and without any of the positive directions given by him to place the goods in one of several places of his choice. *A fortiori,* the delivery to him and defendant was complete when he gave directions to the government where to place them.

It is to be particularly noted that in Santos, the port of delivery in the "Asiatic Prince", the law was such that on the delivery to the customs officials "responsibility for delivery of the goods * * * *devolves wholly upon the customs authorities."* (108 Fed. 289). Of this the Circuit Court of Appeals said:

> "Such a system, *in which the customs authorities assume the ship's responsibilities as to making true delivery, is contrary to the system prevailing in other ports.* Nevertheless it is not incredible that a government may undertake such functions."

Obviously such a system does not obtain in this jurisdiction (see *United States v. Georgi,* 44 Fed. 255 at 257) and as the agreed statement of facts

shows no such system in Antwerp, it must, of course, be presumed that it did not obtain there. Therefore, in the case of the Asiatic Prince, owing to the peculiar system obtaining at Santos, the customs officials, although they had only the *naked custody* of the goods, were responsible to the shippers or to the consignees, who had the *legal possession* of them. But for that peculiar system the consignees would have been their own insurers. In the present case there was no such responsibility on the customs authorities, but it was exclusively upon the defendant, which had the *legal possession* of the goods.

It is clear, therefore, that the rule as to delivery and acceptance, applied in the above cases to deliveries by carriers to consignees, applies equally to delivery by the shipper to, and acceptance by, the carrier, and *particularly to delivery by a carrier to, and acceptance by, a connecting carrier in a foreign land.*

All such deliveries and acceptances must be according to the laws of the country and the custom and usage of the locality in which they take place.

4. *The goods were warehoused, at the time of their destruction by fire,* SOLELY FOR DEFENDANT'S CONVENIENCE.

Debenham deposited plaintiff's goods in the Entrepot as agent for defendant, and for the pur-

poses of defendant's business. After he had notified the shippers of these goods, and had advertised in the public prints on May 22, that the steamer "Sardinian Prince" would be able to load for Montreal direct, and would sail on June 5th; after he had requested the shippers to send him the goods before June 3rd, and the shippers, acting upon the request, had sent them in accordance with his request, and consigned to him; and after, finally, the goods arrived in Antwerp and the way bill was delivered to him by the railroad officials, he had dominion over the goods. While they were in Belgian territory, *the Belgian Government was interested in them only to the extent of assuring their exportation.* The customs warehouse system is provided in modern states for the convenience of importers, and as the best system to keep importations, or goods in transit, under the surveillance of the Government, while at the same time causing the least amount of inconvenience to the importer. Because the warehousing is done for the benefit of the importer (here Debenham), the expense and risk are borne by the importer:

> "* * * the government does not intend either to hold indefinitely * * * or to take the risk of loss that may attend holding them."
>
> *United States v. Georgi,* 44 Fed. 255, at 257; *The Asiatic Prince,* supra.

The *warehouse charges in this case were paid by Debenham,* and, if the goods had been transported from the warehouse to the steamer, the charges

therefor would have been payable by him. The goods were placed in the warehouse, not by the plaintiff nor by the shipper, *but by Debenham as agent for defendant,* and in the performance of his duty, as Continental Traffic Agent of the Canadian Pacific Railway Company, to receive shipments for the defendant at Antwerp. The Revenue Acts of the United States provide that bonded merchandise deposited by the importer, consignee, or agent in a public warehouse owned or leased by the United States is held "at *his expense and risk*". The agreed statement of facts shows that the law of Belgium is the same as to expense, since the warehouse charges were paid by Debenham; and the presumption, both as to expense and risk, is that the law of Belgium has the same provision. It is quite natural that the Government should be unwilling to assume the risk of goods held in its custody for the benefit and convenience of importers, and quite unnatural that it could be willing to do so (*The Asiatic Prince,* supra). The rule, as to provisions for warehousing, is stated in *12 Cyc.,* 1153, in the following words:

> "As such regulations are obviously for the benefit of the importer, the general trend of the regulations has always been that the *expense and risk must be borne by him*" (Article "Customs Duties").

Debenham, for defendant, ordered them into the warehouse. While there, they were at the expense and risk of defendant. They were placed there

by the general agent of a carrier, *for the convenience of the carrier, and as a mere accessory to their transportation from Antwerp to San Francisco.*

There was never any necessity for any detention *whatever* of the goods in Antwerp, so far as the shipper, the plaintiff or the Belgian Government were concerned. The interest of them all required that the goods should *not* be detained. The detention was necessary only for the convenience of defendant, and, exercising its dominion over the goods, it stopped them *to suit that convenience.*

Even should it be presumed (contrary to fact) that the goods, to the shipper's knowledge, were to remain in Antwerp for any time at all, under the supervision of the customs authorities, it would not follow that they were to remain there *indefinitely,* to suit the business whims of defendant. If there had been any detention contemplated, it could have been only one rendered *necessary for the purposes of the Belgian Government,* and not one rendered *desirable for the convenience of defendant.* At the very most, the shipper could be said to have contemplated that the goods would remain under surveillance only until such time as defendant, in the exercise of its free will, would have *the option of either continuing them thereunder for its convenience, or taking them out of such surveillance for its convenience.* Such option the defendant had as soon as Debenham had ac-

cepted the way bill, on May 30th, and it continued to the time when the goods were destroyed. By ordering the goods to the warehouse, Debenham deliberately exercised that option to suit defendant's private purposes. On June 1, defendant again exercised that option by taking the Acquit de Transit; and thereafter, *after the ship was in,* by delivering the "Acquit de Transit", accepting the "remise au depart", and ordering the goods to the vessel. The defendant, from May 30 to June 5, was continually exercising that option to further its convenience; and *particularly after June 1, when the ship arrived in Antwerp.* From that time on, if not before, the goods remained in the warehouse *exclusively for defendant's convenience,* and contrary to that of shipper, plaintiff and the Belgian Government—merely as an accessory to their carriage to San Francisco.

5. *The goods were* IN THE POSSESSION *of defendant as a common carrier, at the time of their destruction by fire.*

While these goods were in the Entrepot Royal at Antwerp, they remained in the *legal possession* of defendant as carrier. Defendant took possession of them as carrier when the way bill was delivered to its agent Debenham. From that moment defendant had the right to control them as carrier, in accordance with its convenience. When Debenham directed the railroad officials to deposit them in the Entrepot he actually exercised *one of the rights*

implied in possession, viz.: *to delegate their physical custody to one who was better qualified to assume it than he or his principal.* If he then did not retain their physical custody, it was because the interest and convenience of this principal required him not to do so. Whenever it suited the convenience of defendant, the goods could be withdrawn from the physical custody of the Entrepot. Whenever Debenham should notify the officials of the Entrepot "that the vessel which was to receive the shipment was ready to receive and embark the shipment for export from Belgium, * * * it would have been the *duty* of the Belgium customs authorities" to redeliver the physical custody of the goods to defendant. He *ratified and confirmed his possession* by accepting the "Acquit de Transit". He again actually exercised his right of possession, while the goods were in the Entrepot, by taking the preliminary steps of withdrawing them, by securing a "Release for Departure", when it suited the convenience and pleasure of defendant, and ordering the goods to the ship. The *custody* of the Belgian revenue officers has nothing to do with the question whether the defendant had *possession* of the goods as a common carrier while they were in the warehouse. The latter question is one between the defendant and the shipper or owner of the goods. The agreement between plaintiff, as owner of the goods, and defendant as common carrier, and any subordinate arrangement between the shipper, acting for plaintiff, and Debenham, acting for defendant, were neces-

sarily subject to the revenue laws of Belgium and those of every country through which the goods passed on their way from Switzerland to San Francisco. Debenham's acceptance of the goods, at Antwerp, for transportation did not require a delivery to him in contravention of the laws of Belgium, but such a delivery as the laws of Belgium would permit. Any delivery to Debenham in conformity with the laws of Belgium was a good delivery to *defendant*. It was a complete delivery into the possession of defendant if it was as perfect as the laws of Belgium permitted (see authorities under I, B, 3, supra). If, by these laws, Debenham, as defendant's representative, was given power to exercise all rights over the goods, except only the right to have *physical custody* while he chose to detain them in Belgian territory, he held the *possession* of the goods as the agent of the carrier.

Suppose that an agent of defendant had accepted delivery of these goods at Uster in Switzerland for through transportation to San Francisco, but, on their arrival at Antwerp, had found that his ship was delayed and therefore, pending her arrival, had ordered the goods to the Entrepot; could it be seriously contended that the defendant's common law liability was suspended during the period while the goods were detained in the Entrepot for the convenience of defendant?

The fact that the storing of the goods, before defendant was ready to place them on board, was under the supervision of customs inspectors whose

duty it was to see that they were not removed in fraud or evasion of the revenue laws nor taken to places unauthorized by law, did not at all affect the relation of the parties to this action, or their duties and liabilities. The fact that the possession of Debenham, or defendant, as between them and the Belgian Government, was a qualified possession, did not affect the transaction as between defendant and plaintiff. The custom house officials had no authority to take the possession or control of the goods, nor did they take possession or control of them. If defendant's ship was ready to receive them on their arrival at Antwerp Debenham had the right to direct the railroad to take them to his ship at once, and it would have been the *corresponding duty* of the Belgian officials to permit them to be placed on board; in case his ship arrived late, they were still in the *possession and under the direction* of Debenham, subject to the *surveillance* of the Government officials. The time when the supervision of the Government officials would cease and the physical custody of the goods be surrendered to Debenham and to defendant *depended exclusively upon the pleasure and convenience of Debenham and defendant.* That the supervision of the Government was at all required, and that the goods were at all placed in the physical custody of the customs officers, *was due to the voluntary and deliberate act of Debenham and was the result of the convenience of defendant.* Had Debenham directed the officials, an hour before the fire started in the public ware-

house, to remove the goods therefrom and take them down to the "Sardinian Prince", *which then had been in port for four days and actually engaged in loading for two days,* it would have been their duty to take them away. The customs officers had no legal right to refuse physical delivery to Debenham one hour before the fire destroyed them. The extent and limit of the powers of the customs officers was to oversee the disposition by Debenham and defendant only so far as essential to prevent frauds upon the Belgian revenues. As between plaintiff and defendant, the goods were delivered to Debenham and to the Canadian Pacific Railway Company when Debenham, on May 30, was in a position to place them in his ship or, in the alternative, to direct their movements in accordance with the business convenience of the defendant common carrier. Clearly these goods would have been far from the Entrepot Royal at the time of the fire, *if defendant's business convenience had not confined them there,* contrary to what plaintiff was justified in expecting after the notice sent to the shipper, and published in the Antwerp paper. The goods were in the warehouse, temporarily, by order of the carrier and solely for the convenience of the carrier, and accessory to the voyage for which they were intended.

While the goods were in the warehouse, the customs authorities had *custody in fact,* but Debenham, at all times, had the right to exercise control in his own name against the world at large (exclusive, of

course, of their owner). Debenham, though not having actual custody, had the right to possess the goods. He had *possession in law,* and the customs authorities held the mere *physical custody* or *possession in fact.* Debenham did not lose the *right of possession in fact; he did not lose the right of possession* merely by delegating the physical control; his active control was, at any moment, capable of being enforced as a matter of legal right. He had a right to recover de facto possession whenever defendant was ready to take the goods. In fact the customs authorities, while the goods were temporarily in the country, claimed not even the absolute physical custody of them, but only a *supervision,* or such qualified custody as was necessary to assure either their exportation, or else payment of import duties in case they remained in the country. Debenham could have detained them on his own wharf, there to remain until such time as he should direct them to be placed on board his ship; had it been convenient for him to order them to the wharf, they would have been under the supervision or surveillance of Belgian customs officials, but practically and effectively in his own actual or physical possession. Or, by electing to pay the duties, he could, at any time, secure physical possession of the shipment, free of all supervision.

When the goods had arrived in Antwerp, and the way bill was delivered to Debenham, the previous carrier had made to him such transfer of control in fact as the nature of the transaction admitted.

Had he been the buyer of the goods, it would then have been too late to stop them *in transitu. He took possession for defendant as carrier,* and positively exercised his *jus dispondendi* by sending the goods to the Entrepot for temporary convenience. He had, as it were, the key to the warehouse and could enter and remove the goods to his ship whenever he pleased. It is not necessary to say that he, under the circumstances, had *actual physical possession* of them; but such a view was adopted by Pollock, C. B., in the case of *Gough v. Everard,* 2 H. & C. 1 (1863). In that case Everard had sold to plaintiff timber lying upon a private wharf belonging to Everard; afterwards the seller became bankrupt. After the sale the buyer obtained the key to the wharf, and the question as to possession of the timber arose. Pollock, C. B., said:

> "The whole of the timber lying at the private wharf was sold to the plaintiff, and the key gave him *the actual possession* of it * * * the key of the wharf had been delivered to him, and he had *manual control* over the timber. The court takes the view that the buyer had as much possession as he could have with regard to the nature of the subject-matter, and that this was a real *de facto possession.*" (Case discussed in *Pollock & Wright, on Possession,* p. 65.)

Quotation marks should appear in the indented passage, as follows:
1. After the word "it", in line 3;
2. Before the words "the key", in line 3;
3. After the word "timber", in line 5;
4. None should appear after the word "possession" in the last line.

The passage quoted from Pollock & Wright's Essay on Possession is to be found at page 179 thereof

manner in the famous *Essay on Possession,* by Pollock & Wright, above cited.

The test of possession is there stated in the following proposition:

> "When a person who has the possession of a thing delivers it to * * * a second person, and the question arises whether the second person *has thereby acquired the possession,* the answer will depend principally, on whether the first person *intended to part with the possession and to transfer a separate and individual and exclusive control for the time being* to the second person."

Applying this test to the case at bar, we reach the following results:

(a) *As between the shipper and Debenham:* The shipper certainly intended to part with the possession and to transfer to defendant a separate and undivided and exclusive control of the goods during the period of their carriage from Antwerp to San Francisco; hence defendant acquired the possession thereof as bailee and common carrier.

(b) *As between Debenham and the Entrepot:* Debenham did not intend to part with the possession, and did not intend to transfer to the Entrepot a separate or undivided or exclusive control for any time. On the contrary, he intended to retain control of the goods

> *exclusively in himself* and to withdraw them from the warehouse at any time in accordance with his own pleasure and convenience; hence the Entrepot did not acquire possession thereof.

A case in which the Government authorities have more perfect control of the thing in its charge than the customs officers have while goods are in the public warehouse is the case of officers of the post office. Yet:

> "An officer of the Post Office seems not as such to be a bailee of * * * things in his charge, but to be merely a *custodian* for (and in a position similar to that of a servant of) the sender."
>
> *Pollock & Wright, Possession,* p. 164.

In fact the control which the law gives the revenue officers over foreign merchandise brought into a country has nothing to do with the contract between the carrier and the consignee or owner of the goods. The promise of the carrier to receive the goods at Antwerp was necessarily subject to the revenue laws of Belgium and every country through which the goods passed in transit, and plaintiff's obligation to Debenham did not require a delivery to him as consignee in contravention of these laws, but only as these laws permitted. Debenham obtained a permit to keep these goods temporarily at Antwerp, and to remove them, for the convenience of defendant, to the Entrepot Royal. That this removal was under the supervision of customs officers, whose duty it was

to see that the goods were not removed in fraud or evasion of the revenue laws of Belgium, or taken to places not authorized by law, did not at all affect the relation of the owner of the goods and defendant, or their duties or liabilities. The fact that Debenham's possession of the goods, as between him and the Belgian Government, was a qualified possession, did not affect the transaction with plaintiff. As between him and plaintiff he had such possession of the goods as made defendant responsible to plaintiff as a common carrier. *The custom house officers could not delay, prevent or interfere with the physical delivery of the goods to Debenham or his ship whenever defendant was ready to demand it.* The extent and limit of the powers of the custom house officers was to direct the mode of delivery so far as essential to prevent frauds upon the revenues of Belgium. The delivery of the goods to Debenham as agent for defendant carrier was a transaction with plaintiff, or plaintiff's shippers at Switzerland, and not with the Belgium authorities.

In *The Seguranca,* 68 Fed. 1014, and in *The Asiatic Prince,* 95 Fed. 1343; 108 Fed. 287, it was held that delivery to custom house officials, at the end of the transit, according to the custom of the port, is a good delivery by the carrier. Applied to the case at bar, the delivery into the Antwerp Custom House by the railroad company carrying from Switzerland to Antwerp would have been a good delivery to Debenham and defendant with-

out actual delivery of the way bill to Debenham and without the positive directions given by him to place the goods in one of several places of his choice. *A fortiori* the delivery to him and defendant was complete when he accepted the way bill and gave directions to the Government where to place them.

As pointed out, supra (II, B, 3), Judge Brown, in *The Seguranca,* clearly recognized the distinction between *legal possession* and mere *physical custody,* and practically defines legal possession as the *"control over the custody or delivery".* The authorities cited by defendant, as heretofore noted, are also careful to mention the distinction, and it is noted in the case above quoted, of *St. Louis etc. Ry. v. Commercial Ins. Co.,* 139 U. S. 223.

Referring to defendant's brief, pages 20 and 21, it is submitted that there was never any "exclusion of control" over the goods by the customs authorities. The defendant had the various options before mentioned, and could ship the goods when and where it pleased, without paying any duties, and without any objection by the Belgian Government. Or, even if it should be conceded that there was ever such an exclusion of defendant's control, *that exclusion was voluntarily created by defendant for its own purposes and wholly unnecessary.* It cannot be said of these goods that they were ever "withheld from the control" of

defendant; *for defendant had at all times, and exercised control over them.* Debenham was always "at liberty to take possession of them", but he preferred not to exercise that liberty until it was more convenient for defendant to so do.

We cannot see that the case of *Hartranft v. Oliver,* 125 U. S. 525, cited in defendant's brief, page 20, is in any way in point on any of the issues of law or fact presented here.

Referring to the quotation from *Hutchinson,* Sec. 755 (defendant's brief, page 21), we submit that it does not apply to this case. As said heretofore, the shippers can only be presumed at the most to have contracted with "knowledge of the *necessity* of customs detention and inspection" when that necessity was for the *benefit of the Government;* they did not contemplate or anticipate any detention under the supervision of customs authorities or otherwise for the *benefit or convenience of the defendant.* The shippers had here made every "provision for the passage of the goods beyond the borders of foreign territory;" they had nothing further to do. All remaining steps were in the defendant's hands. The defendant was *not* here "wholly powerless to prevent seizure and detention", but, on the contrary, *had the power to—at once and any moment—prevent any detention.* It did not exercise that power for the sole reason that it suited its convenience better not to so do.

Furthermore, careful investigation shows that the two cases (*Parker v. Steamship Co.,* 76 N. Y. Supp. 806; *Howell v. Railway Co.,* 36 N. Y. Supp. 544) upon which the quotation from *Hutchinson* is based, and which constitute its sole authority, present problems entirely different from those here involved; and the words *"either in transit"* are founded upon a bare dictum in the former. So far as they apply here at all, these two cases are favorable to the plaintiff. The case of *Pennsylvania Company v. Canadian Pac. Ry.,* 107 Ill. App. 386, cited under the same section of *Hutchinson,* is conclusive in favor of the present plaintiff's contentions. These cases will be found considered in relation to, and distinguished from, the case at bar in Appendices C, D and E, respectively.

The quotation from *Moore,* defendant's brief, page 32, has been sufficiently considered above. The excerpt from *Hartranft v. Oliver,* defendant's brief, page 32, is not relevant here; but, so far as it may be applied at all, it is in plaintiff's favor, since it is said that "goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law *when he is at liberty to take possession of them".* The goods in the case at bar were never withheld from the control of Debenham; he had and exercised his control over them continuously. *He was always, afer the goods arrived at Antwerp, "at liberty to take possession of them".* Also, in the present case, a permit—the "remise au depart"—

had been issued, whereas in the *Hartranft* case it had not.

We cannot see how it can be said that "the shipment was * * * forcibly detained by the Government, as asserted in defendant's brief, page 33. *The Government had no reason for detaining it, and did not, in fact, detain it.* The Government would lawfully deliver it at any time, at any place, in accordance with defendant's instructions. Defendant was not only in a position "to induce the Governmental authorities to deliver the shipment * * * *in due time"*; he was in a position to *command* the Governmental authorities to deliver the shipment *at any time desired.*

The reasons lying at the foundation of the insurer's liability, to which a common carrier of goods for hire is subject, are substantially as stated in the authorities in defendant's brief, pages 34 to 37. But to say that those reasons fail when applied to the case at bar is a fallacious statement. It is also a fallacy to suppose that transportation in bond is a particularly modern device. This case is not a novel case; it requires no change of the existing law, and the old reasons apply fully to it. The case of *Schieffelin v. Harvey,* 6 Johns. (N. Y.) 170; 5 Am. Dec. 206 (Appendix F) refutes the theories of defendant in these respects, *since it is there expressly reasoned that the danger of collusion between carrier and customs officers is such that the carrier is under his usual insurer's liability while the goods are in the custody of those*

officers. We particularly commend the case cited to the court's attention as being remarkably like that presented at bar. Also in the case of *C. & N. W. R. R. Co. v. Sawyer,* 69 Ill. 285, a carrier was held to an insurer's liability for the destruction of *bonded goods,* in its hands, by fire.

In concluding this division, we respectfully submit that the case at bar presents no complex or unprecedented question, and requires only the application of well defined and established principles. Such was the view of the learned judge of the District Court, who said in his well considered oral opinion (pp. 29-30):

> "I am entirely satisfied, under the authorities, that the possession, so far as the consignor is concerned, had been completely delivered into the hands of the defendant. * * * and it seems to me that there can be no question that under the law the liability of the defendant was complete as that of a common carrier."

C. THE MEASURE OF DEFENDANT'S LIABILITY.

1. *The rule.*

It is not denied by defendant, and it is well settled, that the measure of damages for loss of goods by a common carrier is the market value of the goods at the destination to which he undertook to carry them, at the time and in the condition in which they should have been there delivered, together with interest on such amount from such time.

Such is the rule in the federal courts and in the State of California:

Mobile etc. Ry. v. Jurey, 111 U. S. 584;
New York Ry. v. Estile, 147 U. S. 591;
Northern Comm. Co. v. Lindblom, 162 Fed. 250 (9th Circuit);
The Arctic Bird, 109 Fed. 167 (N. Dist. Cal.) (defendant's brief, p. 46);
The Nith, 36 Fed. 86 (defendant's brief, p. 46);
California Civil Code, Secs. 3316-3317;
Ringold v. Haven, 1 Cal. 108 (defendant's brief, p. 45);
Hutchinson on Carriers, Sec. 1360;
Moore on Carriers, 1st Ed., pp. 398-400.

2. *Defendant's alleged exception to the rule.*

The defendant, however, contends (but not positively) that the rule is different if goods are lost before the carrier's ship has left port or commenced its voyage, in which case it is asserted that the measure of damages is the value of the goods at the *port of departure* and not at the *port of destination.*

The cases relied upon by defendant in support of its contention are all to be found in *Moore on Carriers,* 1st edition, page 401, note 9, where they are cited in support of the proposition that, *where special circumstances so require,* the market value at the place of shipment may be taken, instead of at the place of destination. Mr. Hutchinson,

in his work on carriers, evidently doubted the existence of such an exception to the general rule, as is apparent from his consideration of the same cases (*Hutchinson,* Sec. 1360, pp. 1611-1612, Note.)

The only case which is cited by defendant as directly supporting its contention is *Lakemann v. Grinnell,* 5 Bosw. 625. It is to be remarked that that case was decided in the year *1859*, by a *Superior Court of the City of New York*, and is not an authority of any weight, particularly in a federal court. Of the other cases cited in support of defendant's contention, Hutchinson says "this *was said* to be the rule laid down" in them. The case of *Wheelright v. Beers,* 2 Hill's Sup. Ct. R. 391, is an authority of no weight, and is not in point in the present instance. Nor was it in point on the situation presented in *Lakemann v. Grinnell,* where it is cited.

The only federal case cited is that of *Dusar v. Murgatroyd,* 1 Wash. (U. S.) 13. It was decided in the Circuit Court for the District of Pennsylvania in the year 1903, and *the only* language in the case relating to the measure of damages is the following:

> "The profit which might have been obtained, if the sugar had gone safely to Hamburg, was claimed at the opening, but was properly abandoned by the concluding counsel. The difference between the prime cost and charges, and the sales here, forms a fair measure for the damages sustained (8 Fed. Cas. No. 4199, p. 142)."

No authority was cited in support of such a measure of damages, and no reasons were given for it. So far as appears the learned judge was under an erroneous impression as to the general rule mentioned above.

It is true that defendant's liability would not be affected by *private contracts* between the consignee (Wieland) and third parties for the sale of the goods; for the liability of a common carrier is not affected by the result of such *speculation* by the consignees.

> *The Compta,* 6 Fed. Cas. No. 3070 (N. Dist. Cal.).

Interest is given in lieu of such speculative profits:

> *Northern Commercial Co. v. Lindblom,* 162 Fed. 250 (9th Circuit).

But if the court, in the *Dusar* case, meant that the *market value* at the port of destination was not to be considered, it is submitted that it erred in declaring the law. In any event, in 1848, after a careful consideration of a case *in which a vessel capsized at her port of departure,* and destroyed her cargo, Judge Betts, in *The Joshua Barker,* 13 Fed. Cas. No. 7547, held that the owners of the cargo were entitled to recover its value *at the port of destination,* deducting freight and charges, and adding interest on the balance.

The Joshua Barker was cited with approval in *The Arctic Bird,* supra, which was a case decided,

upon a full consideration, by Judge DeHaven, in the District Court in 1901, and followed, in 1908, in *Northern Commercial Co. v. Lindblom* by this court. We respectfully refer the court to the quotation from this case in libelant's brief, page 46, as being a sound and clear exposition of the rule to be followed here.

Whatever the law of the State of New York, upon this point, may be, the law in this district is settled by the above decisions. The rule there laid down is entirely in accord with reason and common sense. Also San Francisco being the place where the contract was made, also the place of performance, and the *forum,* as well, the rule stated in sections 3316-3317 of the Civil Code of this State, governs beyond a doubt.

But *Lakemann v. Grinnell* is distinguishable from the case at bar; for there the *vessel* upon which the goods were destroyed *was destroyed with them* at the port of departure. Here the vessel *was not destroyed* and, presumably, completed her voyage to Montreal. There the voyage of the vessel, as well as of the goods, ended at the port of departure, and the means of performance there failed. This difference is noted in the *Lakemann* case (p. 640) in the attempt to distinguish it from the *Joshua Barker,* in which the circumstances were upon all fours with those in the case at bar.

Furthermore, it cannot be assumed in the present case that the plaintiff could have "procured other

goods on that day (i. e., June 5, 1901) or within a reasonable time afterward, of the same quantity and at the same price" (*Lakemann v. Grinnell,* defendant's brief, pp. 43-44) as those lost. It is submitted that the New York court had no right to make the assumptions in the *Lakemann* case which it did, as the assumed facts, if material, should have been proved by the defendant as an affirmative defense. To make such an assumption here, as to the possibility of procuring like goods in a *foreign country,* on the same day or within a reasonable time thereafter, as to transporting them over several *foreign railways,* and as to procuring transportation for them from a *foreign country* to a port in another *foreign country,* is impossible. This court cannot say that these goods could have been immediately or at all replaced at the same, or any, price, and sent forward by another vessel; and hence cannot in any event follow the *Lakemann* case.

3. *The justice and reason of the rule.*

> "Its *justice* is apparent when the owner of the goods himself is to take them at their destination, there to use or to sell them on his own account."
>
> *Hutchinson, Carriers,* 3rd. Ed., Sec. 1361.

> "The *object* of the law is to make the party as nearly whole as possible for the damages sustained."
>
> *The Lillie Hamilton,* 18 Fed. 327.

Ordinarily, when goods are lost by a carrier, the consignee is damaged to precisely the same extent

whether they are lost at one point or another in the transit. The question is not what *hardship* the carrier sustains, but what *damage* the consignee suffers. To have different rules for losses at different stages of the same voyage would lead to endless confusion.

4. *Defendant's alleged exception to the rule is not here applicable.*

Even did defendant's asserted exception exist, it would not be applicable to the case at bar, for the reason that the goods here in issue were not destroyed at the *commencement* of the transit, but thereafter, and at an *intermediate* point therein. For, as pointed out in the first division of this brief, *the delivery to the defendant took place on May 30, 1901,* when the way bill was delivered to Debenham and he directed the goods to be placed in the Entrepot Royal. *They were not destroyed by fire until June 5, 1901.* Therefore, at the time of their destruction *they had been in transit for six days.* Not only had they been in transit in point of time, but they had been in transit in point of location and distance; *for they had been carried in fact by defendant from the place where they were deposited when Debenham received the way bill and gave instructions to place them in the Entrepot Royal, to the Entrepot Royal.* They commenced their voyage at the point where they were deposited when the way bill was delivered and Debenham gave his directions; that was, as to them, "the port of departure". From that point they voyaged to *an intermediate*

point in the entire transit, to wit, the Entrepot Royal; and while at that point, still in contemplation of law, in transit and voyaging toward their destination, they were destroyed. These facts present a case for the application of the general and, we submit, the only rule as to the measure of damages. The case would not be within the alleged exception to the rule, even if the existence of such an exception were to be admitted.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed in all particulars, with costs of this appeal to the defendant in error.

Dated, San Francisco,
May 24, 1915.

Respectfully submitted,

LOUIS T. HENGSTLER,
GOLDEN W. BELL,
Attorneys for Defendant in Error.

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APPENDIX.

A.

SOUTHERN RAILWAY CO v. HUBBARD BROS., 146 Fed. 31.

The defendant railway company contracted with a compress company that the latter should receive cotton, compress it, and load it upon cars of the defendant *as directed by defendant;* the compress company to be liable for any loss of or damage to cotton while in its possession, *fire excepted.* Smith and Coughlan shipped at Nettleton, Miss., on the K. C. M. & B. Ry. 100 bales of cotton consigned to plaintiffs in New York over said railway and connecting carriers. The defendant railway company was one of such connecting carriers. The bill of lading restricted the liability of each successive carrier to damage or loss due to its own fault only.

The cotton was carried over the K. C. M. & B. Ry. and the Belt Ry., and by the latter *delivered to the compress company. That was the last trace of the cotton.* The compress company never delivered it to the defendant, but *the K. C. M. & B. Ry. notified the defendant of the delivery to the compress company and the receipt of the compress company for it was handed to defendant.*

The plaintiff at first proceeded against all three railroads, but on proof of the above facts confined its suit to the defendant. The defendant's

liability depended upon *whether or not a delivery of the cotton had been made to defendant as a common carrier.* To establish that such was the case the plaintiffs relied on the contract between defendant and the compress company and also upon *the custom of the K. C. M. & B. Ry. to make deliveries to the compress company for forwarding on defendant's railway.* The cause was submitted to the jury and a verdict was rendered for plaintiff. A reversal of the judgment thereon entered was prayed, but the judgment was *affirmed.*

The Circuit Court of Appeals, through Severens, J., speaking of the contract between defendant and the compress company said that it was not necessary to consider whether it alone justified the judgment,

> "* * * for there was other evidence from which the jury might have found that *the employment of the compress company was for the purpose of facilitating the transportation by reducing the bulk of the cotton, and was an expedient whereby the railway company could more easily earn the stipulated freight than if it should transport it in its larger bulk. If it was done for the convenience of the railway company, or mainly for its convenience, it surely would not be unreasonable to find that during the time while the compress company had the possession it was holding it as agent or employe' of the railway company.*" (p. 35.)

The K. C. M. & B. Ry. corresponds to the Belgian State Railway in the present case; the defendant there corresponds to the defendant here;

the compress company corresponds to the customs authorities.

The case at bar is stronger than the case cited; for there the K. C. M. & B. Ry. *merely notified* the defendant of the delivery to the compress company and handed to the defendant the latter's receipt. The defendant did not give any direction as to, or exercise any control over, the cotton. In the present case, however, not only was the defendant *notified* of the arrival of the goods in Antwerp, and *placed in possession of the way bill* (on May 30, 1901), *but the defendant actually exercised full control and direction over them,* and paid the warehouse charges on them.

In the case cited the *physical custody* of the goods was in the compress company, and it was to load them upon the defendant's cars *when and where directed or instructed* by the defendant (Report, page 33, lines 1-3). The defendant there had the *legal possession, the jus disponendi,* through the notice and the receipt, and *although it never exercised its jus disponendi,* it was held responsible as a common carrier for the non-negligent loss of the goods. In the case at bar the *physical custody* of the goods was in the customs authorities; they were to load them upon the defendant's ship *when and where directed and instructed by defendant.* The defendant had the *legal possession;* it directed the *physical custody* to be placed with the Entrepot Royal; and it retained the *jus*

disponendi while the goods were detained for its convenience in the Entrepot. The defendant *actually exercised its jus disponendi* by directing the officials to take the goods to the Entrepot Royal, its ship not being ready to receive them, by later directing them to the wharf and by paying the warehouse charges. These facts rendered defendant responsible as a common carrier for the destruction of the goods by fire.

In the case cited the cotton was delivered to the compress company *for or mainly for the convenience of defendant.* In this case the goods were placed in the Entrepot Royal *solely* for the convenience of the defendant; the shippers were in no possible manner benefited thereby, and it was contrary to the reasonable expectations which they had a right to entertain after defendant's notice and advertisement.

In the case cited the defendant had the option: (1) to place the cotton directly on its cars; or (2) to have it delivered to the compress company. In the case at bar the defendant had the option: (1) To passively leave the goods in the former carrier's hands; (2) to place the goods directly on its ship; (3) to have them delivered to the Entrepot Royal; (4) to have them placed on the wharf, from which they were to be loaded on the ship; or (5) to pay the duty on them and remove them entirely from customs surveillance. And there can be no doubt that the defendant

could have placed around the goods, either at the wharf, or at the Entrepot Royal, every precaution against loss or damage which it chose to take. It could have stationed its agents at or about either place, without in any manner interfering with the naked physical custody or surveillance of the customs officials. There was no "exclusion or control" over them as to the defendant, *even with reference to their physical custody,* much less their legal possession. They were placed in the Entrepot Royal *not for the protection of the Belgian Government,* but solely for the convenience of the defendant; the Belgian Government would have been just as adequately protected, and more so, had the goods been placed on shipboard instead of being detained in the Entrepot Royal.

B.

NORTH GERMAN LLOYD S. S. CO. v. BULLEN, 111 Ill. App. 426 (1903).

The plaintiff purchased in Chicago two tickets for the use of his wife and daughter, entitling them to passage room on the Str. "Kaiser Wilhelm de Grosse" from New York to Southampton. The agent from whom the tickets were purchased delivered with them tags to indicate what was to be placed in the stateroom and what in the hold. "The agent told appellee (plaintiff) that baggage so marked for delivery in the stateroom, and sent direct to the appellant company would be placed in her stateroom, where she would find it, *and that it would be advisable to forward it a few days in advance of the time of sailing.* The trunk in controversy was so tagged and was checked to New York where it arrived the evening of June 27, 1900. By direction of appellee's wife, it was delivered at the docks of the appellant at Hoboken, some time before the evening of June 30, when it was *lost in the fire* which destroyed appellant's docks * * *". It was contended that, as the baggage was delivered to appellant *five days before the time for sailing and two days before it was destroyed by fire,* it was held in storage, and that appellant was not liable as a common carrier for the loss, nor for the damages. Held for the plaintiff. Affirming the judgment of the Circuit Court, the court said:

> "The evidence tends to show that the trunk in question was sent to appellant *in accordance*

with the advice and direction of its agent who delivered the tags furnished by the company for the purpose. It was *in accordance with this evidence and direction that the baggage was sent over and delivered in advance of the time of sailing.* There were in this case *no further acts or instructions required of appellee before putting the trunks in the stateroom on board the ship. The delay in putting them on board was for the convenience of appellant, not of appellee.* The stateroom was its immediate destination, and there, as the event shows, it would have been safe from the fire in which it was lost, and there appellant had undertaken to deliver it in the usual course of business. *It was in appellant's hands, not for storage on its own docks, but for delivery in the stateroom on board its own ship. It is not a case, therefore, where the goods were delayed for the convenience of the owner and where the duty of immediate transportation had not arisen at the time of the loss, as in* (other cases) where the goods had been delivered to the carriers to await further orders from the shippers, and were therefore held to be in the carrier's custody only as warehousemen. As is said in *Barron v. Eldridge,* 100 Mass. 455, 458:

'If, without putting them in transit, the carrier for HIS OWN TEMPORARY CONVENIENCE, *places them in store, still the liability of a carrier attaches.'"*

We do not deem it necessary to discuss the application of the above case to the facts here involved further than to ask that they be read in connection with Debenham's letters to the shippers of May 17th and 20th, 1901, pages 5 and 6 of the Agreed Statement of Facts.

C.

PENNSYLVANIA CO. v. CANADIAN PAC. RY. CO., 107 Ill. App. 386.

Certain barrels of oil were delivered by the shipper to the Pennsylvania Company, a common carrier, at Cleveland, Ohio, for transportation to Brandon, Canada. The Pennsylvania Company gave to the shipper a bill of lading which set forth that the oil was to be delivered to "G. G. Fortier, Brandon, Manitoba, care Canadian Pacific." The Pennsylvania Company carried the oil to Chicago and there delivered it to the C. M. & St. P. R. R. Co., receiving a receipt which recited that the oil was marked "G. G. Fortier, Brandon, Manitoba, care Canadian Pacific, care C. M. & St. P." The C. M. & St. P. Ry. carried the oil to a point in Minnesota and there handed it over to the St. P., M. & M. Ry. The St. P. M. & M. Ry. carried it to St. Vincent, a point on the boundary line of Canada, where it was bonded over to the Canadian Pacific Ry., and by it receipted for. But, through error, the Canadian Pacific changed the name "Fortier" to "Foster" in its receipt for the oil. Later a second shipment of oil was forwarded in the same manner, and the same error in name was made.

The oil in question was dutiable and when transferred to the Canadian Pacific Ry. on the boundary line of Canada (i. e., at St. Vincent) *"the cars were sealed and tagged* to indicate that the goods were *in bond"* (p. 388). "When the oil arrived at Winnipeg" (after passing the Canadian border) "it was *under the control of the customs officials and*

could not be carried forward until properly entered, cleared and the duties paid" (p. 388). No one could do this on behalf of the consignees, except themselves or attorneys duly authorized by power of attorney (p. 388). "The *invoice* which accompanied the oil from St. Vincent was, upon arrival of the oil at Winnipeg, *delivered to the customs officials"* (p. 389). It was the custom of merchants west of Winnipeg (and Brandon was in that direction therefrom) to have a customs broker at Winnipeg look after the goods on their arrival at Winnipeg and clear the same (p. 389). *It was not the duty of the Canadian Pacific Ry. to pay the duties upon the goods* (p. 389). "By sufferance, goods were permitted to remain by the customs officials in the yards of the Canadian Pacific Ry. until cleared, for a period generally of not longer than six months, *thus constituting the yards of the company a sufferance warehouse"* (p. 389). "The customs duty upon the oil in question was never paid (p. 389).

The oil arrived in Winnipeg in a leaking condition. There were no addresses on the barrels in either shipment (p. 389). The consignees had never before received oil from the Canadian Pacific Ry. at Brandon. *On arrival of the oil at Winnipeg the Canadian Pacific Ry. mailed notices of that fact to the erroneous names in the said receipts* (p. 389). The warehousing room at Winnipeg was limited and the oil was unloaded and deposited on the ground, where it remained for a time. *The*

Canadian Pacific Ry. made an effort to have the duty paid and the oil removed; but for lack of invoices did not succeed, and to save the oil from total destruction had it hauled some distance by team to a tank of the Imperial Oil Co. and there stored (pp. 390, 389). *"This was done under the permission of the collector"* (of customs) *"and by direction to * * * his subordinate at the station"* (p. 390). Some of the oil leaked out of or was sold from the tank; at any rate, some of it disappeared (p. 392).

The Pennsylvania Company (the initial carrier), was sued by the consignees (p. 391) of the oil, for non-delivery and loss of the oil, and held liable. In this action the Pennsylvania Company seeks to recover from the Canadian Pacific Ry. the amount which it had been compelled to pay to the owners, on the ground that it failed to perform its duty as a common carrier (p. 392). *The error in the consignees' names was due to no fault of the Canadian Pacific Ry.* (p. 391).

The appellate court reversed the lower court and remanded the case. Quoting from *C. & N. W. R. R. Co. v. Sawyer,* 69 Ill. 285, the court said:

> "The carrier received the goods to be transported for hire, *knowing at the time that they were goods subject to duty to the Government.* * * * When the carrier received the goods with this knowledge, *it impliedly undertook that the goods should be safely delivered at the place of their destination in the special manner required,* and within a reasonable time" (p. 394).

The court further said:

> "If, as seems to have been the case, *the governmental power prevented the carriage of the oil to its destination until the duties were paid,* then it was appellee's (Canadian Pacific Ry.) duty to take all practicable means *to notify the consignees, and, failing in that to notify the shippers of the situation. Meanwhile the appellee was at liberty to turn the oil over to the customs officers, or to store it in a suitable and reasonably safe place*" (p. 392).

The court then said that the Canadian Pacific Ry. failed to notify either the consignees or the shippers that the oil was being held at Winnipeg for duty *and breached its duty as a common carrier, rendering itself liable as such.*

In the case at bar the defendant *did not even attempt to notify either the San Francisco consignees or the shipper of the arrival of the goods or that it intended, for its convenience, to place them in the Entrepot Royal for a time before loading.* On the contrary, by its notice to shippers and its advertisements it had led the shippers to believe that the goods *would be in the ship* before the time when fire consumed them in the Entrepot. And had the defendant given *to the shipper the disposal of the goods in the interim,* the shipper might have chosen the wharf instead of the Entrepot Royal, in which case the goods would not have been destroyed. Or, even had the shipper, after such notice, directed the goods to be placed in the Entrepot Royal, the shipper would have had

the *opportunity to procure insurance against loss by fire while therein, as it would have done without doubt had it not supposed that the goods were insured sufficiently after arrival in Antwerp by the defendant in its capacity as common carrier.* But the defendant did not notify the shipper of the interruption of the transportation of the goods, due to the defendant's own convenience, and so did not afford the shipper the election of how or where to dispose of or protect the goods in the interim; on the contrary, the defendant took them under its exclusive control, and *exercised its own option, its jus disponendi, by placing them in the Entrepot Royal.* This very act is conclusive proof that the shipper had no further control of the goods, either in fact or in the contemplation of the defendant.

The government power prevented the carriage of the goods in the Illinois case just as in the present case, until the moment arrived when either the duties were paid or they were embarked by the carrier for export. That moment, in both cases, depended upon the exclusive volition of defendant.

D.

PARKER v. NORTH GERMAN LLOYD S. S. CO., 76 N. Y. Supp. 806.

The facts were that the plaintiff had travelled from New York to Germany on defendant's steamer. After arrival at Bremen, the trunks of plaintiff, being there in defendant's baggage room, defendant's agents gave plaintiff, who desired them forwarded to an interior town in England, a receipt for "two trunks for transfer by slow freight to * * * Hove-Brighton". The agent forwarded them in the usual way, and after their arrival in England they were detained in the customs house, where they were destroyed by fire.

It was held that the defendant was not liable for the loss. The ground for the decision was that the transportation of the trunks *by defendant was ended on their arrival at Bremen;* and the contract to "*transfer* by slow freight" to an interior point in England *was not a contract of the defendant for carriage, but only a contract to forward, not placing a common carrier's responsibility on defendant.*

By way of *dictum,* the court cited *Howell v. Grand Trunk Ry.,* and said that, "the reasoning applies to the case at bar, and is equally applicable when the fire occurs in transit as when it occurs in the customs house at the place of destination".

As pointed out in Appendix E, there had been a delivery in the Howell case, to the customs authorities, of both *possession and custody—a delivery,*

leaving no jus disponendi in the defendant; so the learned judge is not correct, in the Parker case, in saying that the reasoning of that case applies equally to the case before him, unless it is because there was also such a delivery by the North German Lloyd to the English customs officers. If there *was* such a delivery, then the Parker case is distinct from the case at bar for the reasons enumerated under the Howell case, above. In any event, in the Parker case there was, when the goods were destroyed in the customs house, *neither possession nor custody nor control* in the defendant as a common carrier, *because it was not a common carrier* as to the trunks between Germany and England. Nor did it have any *jus disponendi,* or control whatsoever over the trunks.

E.

HOWELL v. GRAND TRUNK RY., 36 N. Y. Supp. 544.

The facts were as follows: The plaintiff purchased a ticket from defendant railway from Blythe, Canada, to Suspension Bridge, New York, and obtained leave to stop over until next day at an intermediate station. He also requested that his baggage be unloaded there, *but this was not assented to,* and it was carried through to the point of destination (Suspension Bridge), where, pursuant to law, it was taken in charge by the U. S. customs officers. It there remained "in the *possession and custody*" of the customs authorities until destroyed by fire.

It was held that the defendant was not liable for the loss. The defendant was not, under the circumstances of the case, obligated to unload the baggage at the intermediate station. "The baggage was taken into the *possession* of the customs officers of the United States * * * and remained in the *possession and custody* of those officers * * * at the time of the loss by fire which destroyed the building in which the baggage then was. The baggage was not in the *possession or under the control of the defendant* at the time of the loss; *nor was it in any sense the fault of the defendant that it was not so.*"

Thus the court clearly recognizes the distinction between legal possession and physical custody, and bases its decision, correctly, upon the fact that at the time of the fire, there had been *a delivery by the* carrier putting BOTH *the legal possession* AND *the*

physical custody out of its hands. The carrier, obviously, had no further control of any kind over the goods—*no option by which it could choose the place of deposit during the possession of the customs authorities, and no option by the exercise of which it could remove the goods wholly from any connection with the customs officials.* It had no *jus disponendi* over the goods, nor any connection whatever with them. It was as if they had been delivered to the consignee or owner. It is a wholly different case from the present. And, further, the detention was clearly *for the purposes of the U. S. Government, and not for the convenience of the carrier,* as it was in the present cause.

F.

SCHIEFFELIN v. HARVEY, 6 Johns. 170; 5 Am. Dec. 206.

Plaintiff shipped nutmegs on board defendant's vessel at New York for London. On the arrival of the vessel at London it was found that the goods could not be landed and delivered to the consignees, being prohibited by the law of England. It was then agreed between the master and the consignees that the goods should remain on the vessel and be returned to plaintiffs "at their own risk". *"All the time the vessel was at London, English custom-house officers were on board, who alone, and the mate, had access to the goods."* On arrival of the vessel at New York a shortage in the nutmegs was found, and plaintiff sued the carrier in assumpsit therefor, alleging that they were stolen while on board defendant's vessel. *The missing nutmegs were in all probability purloined by the custom-house officers, while they were stored in the ship's hold in London* (5 Am. Dec. p. 207). Held: Judgment for plaintiff. The court said:

> "It is, however, insisted, for the defendant, that after the master was prevented from delivering the goods, by reason of their being prohibited articles, he is no longer to be regarded in the light of a common carrier, but as a mere bailee, and so liable for negligence only." (5 Am. Dec., p. 208.)
>
> *"It is said that the nutmegs must have been stolen by the custom-house officers, while they were on board the ship and had access to them in order to prevent them from being smuggled on shore. But this is no excuse. It was the duty of the master to guard against such acci-*

dents; and if he has neglected to do it, or been so unfortunate as not to detect the theft, if one was committed, *he, and not the shipper, must bear the loss. This was one of the risks which he agreed to assume; and he must have known that some persons, in all probability, would be stationed on board, to guard against any attempt to run the goods, because such a precaution was both reasonable and right. The master was left in full possession of the ship, and his control over her and her cargo, except as it related to the landing of the goods in question, was as complete as if the custom-house officers had not been on board.*

"This distinguishes the present from cases where it has been held, that during the period of detention by captors, as prize, or by the belligerent for adjudication, all the responsibilities of the master and crew are suspended. In such cases the master is temporarily deprived *of his command; but such was not the effect of having the custom-house officers placed on board of this vessel, for purposes altogether different and justifiable. To admit such an excuse as this would be opening the door to all the evils to be apprehended from fraudulent combinations and collusions between the master and the crew and other persons, which it was the policy of the law to prevent."* (5 Am. Dec. 208-9.)

No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error,
(Plaintiff below).

REPLY BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

CURTIS H. LINDLEY,
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Attorneys for Plaintiff in Error.

Filed

Filed this.....*day of June, 1915.*

JUN 16 1915

FRANK D. MONCKTON, Clerk.

F. D. Monckton,
Clerk.

By.....*Deputy Clerk.*

CORRECTIONS OF, AND ADDITIONS TO, OPENING BRIEF FOR PLAINTIFF IN ERROR.

Upon a re-examination of its opening brief, the plaintiff in error finds that the subjoined corrections of, and additions to, the same should be made:

On page 23, after the word "varied" on line 7 add: * * * (Tr. of Record, pp. 13 and 14).

On page 27, after the word "said", at the end of the first paragraph add: (Tr. of Record, pp. 17 to 21).

On page 28, after the first quotation strike out the words: (Statement of Facts, pp. 6 and 7), and in lieu thereof insert: (Tr. of Record, top of page 19).

On page 29 at the end of the first quotation add: (Tr. of Record last line, p. 19 and lines 1 to 11, top of p. 20).

On page 29 strike out the words "possession" and "control" on the third line of the second quotation, and in the same quotation strike out the words "(statement of facts, pp. 7 and 12)" and in lieu thereof insert: (Tr. of Record, lines 1 to 7, top of p. 17).

On page 30, after the end of the first quotation, strike out the words "(statement of facts, pp. 2 and 3)" and in lieu thereof insert: (Tr. of Record, last three lines on p. 13 and first 7 lines, top p. 14).

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REPLY BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

The brief of counsel for defendant in error concedes that "the whole case revolves upon the single question * * * whether the goods at the time of their destruction were in the possession of the defendant as a common carrier." Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not (see Brief of Defendant in Error, p. 7).

I.

This contention of counsel for defendant in error is based upon their assumption that the carriage involved in the case at bar was a shipment of the ordinary, usual character coming within purview of the rules of the common law and of the precedents, illustrating and applying the common law rules, which they cite. Proceeding upon this assumption, they declare (Brief of Defendant in Error, p. 11) that: "the goods were delivered to defendant as a common carrier for immediate transportation, prior to their destruction by fire", and that the goods were accepted by defendant as a common carrier for immediate transportation prior to their destruction by fire.

But this assumption is not warranted, but is clearly negatived by the case stated by the parties, which declares expressly and unequivocally:

> "It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company to receive at Antwerp, Belgium, *to the extent that such shipments could be received by any one at Antwerp pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium*, shipments of merchandise (like the one in controversy in this action) coming there in bond for export, pursuant and subject to said Treaty; * * * but it was his duty to *receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in Bond*

for export pursuant and subject to the terms of the International Treaty hereinafter referred to might be received by any one at Antwerp to be thence forwarded under and pursuant and subject to the provisions of said Treaty".

(Transcript, pp. 13 and 14.)

It is difficult to conceive of any language which could more clearly express the agreement, purpose and intent of the parties to deal, as best they could, with an unusual and new state of affairs, viz: a shipment *in bond in transit for export.* Such shipments were unknown to the common law and were not within the contemplation of the courts which rendered the opinions to which the Brief of Defendant in Error refers.

In drafting their case stated, the parties clearly understood the special situation involved and their exceptional relation, and they advisedly stipulated as a fact that it was the duty of Mr. Debenham, as agent for the Canadian Pacific Railway Co., to receive, at Antwerp, Belgium, the shipment under consideration, but only *to the extent that such shipments could be received by anyone at Antwerp,* subject to the International Treaty specified and the Belgian laws.

"But it was his duty to receive and forward such shipments of merchandise as aforesaid *only to the extent and in the sense and in the manner according to which* shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter

> referred to *might be received by anyone* at Antwerp to be thence forwarded *under and pursuant and subject to the provisions of said* Treaty".
>
> (Transcript, pp. 13 and 14.)

We think it requires no argument to show that a shipment of merchandise which, coming in bond in transit for export to Antwerp, Belgium, is there received by a traffic agent

> "to the extent that such shipments could be received by anyone pursuant to the provisions of the International Treaty referred to and the Belgian Laws,"

was received by such traffic agent only in a qualified sense. The parties to this action expressly characterized and explained the function of the traffic agent in the case here involved by further declaring as to him:

But it was his duty to receive and forward the shipment of merchandise as aforesaid *only to the extent and in the sense and in the manner and under and pursuant and subject to the provisions of the treaty and the Belgian laws*—not in the absolute unqualified sense.

II.

NO QUESTION OF USAGE OR CUSTOM IS INVOLVED IN THIS CASE.

The case stated also does not show that the goods were delivered to and accepted by defendant ac-

cording to the custom and usage of the port of Antwerp or that there was any custom or usage relating to cases of the kind at Antwerp.

There is not a scintilla of evidence in the record relative to any custom or usage of any kind or place, nor would such evidence have been relevant or material in view of the facts disclosed by the case stated which legally excluded consideration of any custom or usage. The parties stated all the facts relevant to the shipment of merchandise under consideration, and these facts conclude the case.

The goods were *not* warehoused at the time of their destruction by fire solely for defendant's convenience, but were so warehoused in consequence of an ordinary exigency of traffic which was within the contemplation of the parties.

The case stated makes a clear showing on this point, as follows:

On May 20th, 1901, Debenham wrote to Oswald Roth:

> "Confirming mine of the 17th inst., I take pleasure in advising you that the Steamer 'Sardinian Prince' will sail on June 5th and I request you therefore to forward me the lot of cheese to Antwerp South Transit Station to arrive not later than June 3rd (1901)."
>
> (Transcript, p. 16.)

In reply to this note the shipment was forwarded so that it reached Antwerp on May 30th, 1901, *three days ahead of time.*

(Transcript, p. 18.)

This fact of itself precludes the claim that this delivery (such as it was) was for *immediate transportation.*

The steamer "Sardinian Prince" did not enter the port of Antwerp until noon on Saturday, June 1st, 1901, and did not begin loading her cargo until Monday, June 3rd, 1901.

Transcript, p. 21.

It was therefore necessary to leave the cheese in the custody of the Revenue Authorities of Belgium, for at least three days (from May 30th to June 3rd, 1901), and thereafter until the steamer was ready to embark it. This was not for the convenience of defendant, but occurred as an ordinary, usual incident of the kind of transportation provided for and contemplated by the parties, who acted advisedly in this regard too.

The showing made on this point by the case stated is as follows:

> "The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty afore-

said, and of the laws of the Kingdom of Belgium, *and not otherwise,* said Debenham, on behalf of defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp to San Francisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied. In the regular course of business, and pursuant to the terms of the arrangements aforesaid, shipments had been from time to time received by said Debenham for plaintiff, as hereinabove set forth, forwarded to San Francisco, and delivered to plaintiff during five years preceding the shipment here in question".

(Transcript, pp. 14 and 15.)

It is to be noted that the plaintiff does not claim and the "case stated" does not show that the shipment was unduly delayed at Antwerp, or that plaintiff charged defendant with any negligence, or misconduct, by reason of its warehousing the shipment as appears, or otherwise in any regard. It does show that the parties had dealt with each other as in the transaction here involved during five years preceding the shipment in question substantially as in this instance, always contemplating such special arrangements and shipments (in bond in transit for export) as the one here involved. The burning of the bonded warehouse was not occasioned by any fault or negligence

of defendant (Transcript, page 22), yet plaintiff seeks to charge defendant with the extraordinary liability of an insurer.

We agree with the statement of defendant in error, found in its brief on page 7, that "the whole case revolves upon the single question, whether the goods, at the time of their destruction, were in the possession of the defendant as a common carrier".

The defendant in error has fixed the exact point of time, at which it claims the goods came into the possession of the plaintiff in error, viz: when the way bill was delivered to its agent Debenham.

(Brief of Defendant in Error, p. 41.)

Accepting that as the pivotal point of time, upon which turns the question of the passing of possession to the plaintiff in error, we contend:

III.

THAT THE POSSESSION OF THE GOODS IN QUESTION DID NOT AND COULD NOT PASS TO THE PLAINTIFF IN ERROR UNTIL THEY WERE ACTUALLY PHYSICALLY DELIVERED BY THE BELGIAN GOVERNMENT INTO THE HOLD OF THE SARDINIAN PRINCE, THE VESSEL WHICH WAS TO TRANSPORT THEM BEYOND THE CONFINES OF THE KINGDOM OF BELGIUM.

We maintain that the case now before the court should be viewed in the light of a new and peculiar state of facts, for which no precedent is to be found in the books, and which calls for a differentiation in principle and a change of the general rule.

Under the provisions of the International Treaty permitting transport of goods in bond in transit for export through the territories of the several sovereignties operating under it in contemplation, and subject to the provisions, of which treaty the contract of carriage in this case was entered into between the parties there was an *imperative* requirement that for the entire time during which the shipment was in transit in the Kingdom of Belgium—that is from the moment it crossed the Belgian frontier to the very point of time when it was actually, physically delivered on board the transporting vessel—it should remain "*uninterruptedly in the exclusive, official custody, possession and control of the customs authorities of the Kingdom of Belgium*" (Tr. of Record, pp. 19 and 20).

The contract of carriage involved in this case was entered into by all the parties concerned—the shipper, the carrier, plaintiff in error, and the importer, defendant in error—with full knowledge of this requirement, which became a part of the contract, and because of it, we maintain that the shipper was *powerless to deliver,* and the carrier, the plaintiff in error, was *equally powerless to receive* the possession and custody of the shipment, and could at best exercise but a qualified control of it, until the very moment when it was actually physically delivered by the Belgian government officials on board the vessel which was to transport it beyond the confines of the Kingdom of Belgium.

It is true that Debenham, the agent of the plaintiff in error was named in the waybill as the consignee of the goods, but he had at best but a partial control over them, the limits of which were defined as follows:

> "It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, to the extent that such shipment could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in this action) coming there in bond for export, pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as was necessary to have such shipment of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant to the provisions of said treaty."
>
> (Tr. of Record, pp. 13 and 14.)

In view of this stipulation it is disingenuous to suggest, as has been done by defendant in error (Brief for Defendant in Error, pp. 14 and 46), that

Debenham had the option of paying the charges and duties due the Belgian government on the shipment and thus reduce it to his possession unfettered from the exclusive possession and custody of the Belgian government prescribed by the bonding treaty.

Oswald Roth, the shipper, the Canadian Pacific Railway Company, the plaintiff in error, the carrier, and Wieland Bros., the purchaser, importer and real consignee of the goods, all the parties interested and acting in connection with the shipment, contracted with each other with a view of *carriage in bond,* and *not otherwise,* from the initial point of departure in Switzerland to the ultimate point of destination at San Francisco.

All that Debenham was authorized and empowered to do was:

1. To receive the way bill for the goods, which we submit, under the peculiar facts in this case was nothing more than a notification by the Belgian government officials that the goods had arrived at Antwerp.

2. To indicate to the Belgian government where it should keep the goods until delivery by it into the vessel, which was to transport them out of and beyond the Belgian territory.

3. To obtain a permit from the Belgian customs authorities to thus take them out of the Kingdom of Belgium.

Such was the actual situation, and all parties connected with the shipment knew and are presumed to have known the actual state of affairs.

Had Debenham adopted the course suggested by the defendant in error, he would have been acting in excess of his limited authority and in direct violation of the contract of carriage entered into by his principals, subject to which the seller and shipper of the goods forwarded them.

Furthermore if, as is maintained by the defendant in error, the mere delivery to and acceptance, by Debenham of the way bill was tantamount to a complete delivery of the goods, for and on behalf of his principal for immediate carriage, the liability of the latter as an insurer became fixed at that precise point of time, then we contend that it becomes immaterial at what place the goods were at the time they were destroyed, or whether some time intervened between their arrival at Antwerp and their being placed on board ship. If this view were correct the court would have to decide, as a matter of law, that, even, if the Sardinian Prince was at that very moment at the dock ready to receive the goods, and if Debenham had proceeded immediately to procure the "remise au depart", and in pursuance thereof had ordered the goods to the wharf alongside the deporting vessel in the very car in which they had arrived at Antwerp, and then were and if in that interval of time no matter how short the shipment had been destroyed, then the plaintiff in error is liable for them, notwithstanding the fact that Debenham, its agent, had not and could have nothing whatsoever to do with their safekeeping, or the manner of their

transportation from the railroad depot to the wharf, and was expressly denied any possession or custody of them.

To put the matter in another way: By reason of the express provisions of the International Treaty in pursuance of which the goods were shipped from Switzerland to the point of their deportation out of the Kingdom of Belgium, the *status* of these goods as to possession and custody at least, could not be altered by anything that the shipper in Switzerland, or the plaintiff in error in Antwerp, or the importer and buyer in San Francisco could do, from the moment of time when the car containing them was taken charge of by the Belgian government at the Belgian frontier at Sterpenich, until the very moment of time when they were put on board of the transporting vessel, and that *status* attached to them, as long as they remained in Antwerp, whether they were in the Royal warehouse or on the wharf to meet the exigencies of ocean carriage, or whether they were immediately transferred, from the railroad depot where they arrived in Antwerp, to the hold of the Sardinian Prince at the Ledegank dock. And we submit again that none of the parties concerned with the shipment could alter or change that *status* during that entire time, the provisions of the treaty referred to having by its express provisions, taken it out of their power to do so. From the correspondence of the parties (Transcript, p. 18), it appears that they understood the

goods could not be exported in any event before June 3, 1901. It is to be noted, nevertheless, that the goods arrived at Antwerp on May 30, 1901, three days before June 3, 1901. Upon their arrival the station authorities notified Mr. Debenham and delivered to him the way bill accompanying the shipment (Transcript, p. 18). Can it be contended that plaintiff in error thereupon immediately became liable as an insurer of the goods? If the goods had been burned in the warehouse between May 30 and June 3, 1901, would defendant be liable?

IV.

THE GOODS WERE IN CUSTODIA LEGIS FROM THEIR ENTRY INTO BELGIAN TERRITORY UNTIL THEIR DESTRUCTION.

Except for the provisions of the International treaty for the transportation of the shipment in bond in transit for export, the authorities of the Kingdom of Belgium would have seized the shipment immediately upon its arrival within their jurisdiction, and would have held the same until the lien of their Government for internal revenue charges upon the same had been paid.

Hartman v. Bean, 99 U. S. 393, 397.

As soon as the shipment was introduced or entered into Belgium, duties became payable on it to the Belgian Government and continued to be payable until the shipment was exported pursuant to the treaty.

U. S. v. Ehrgott, 182 Federal Rep. 272.

Under the provisions of the treaty referred to, the shipment might have been released from the lien which the Belgian Government had upon it, as security for the payment of taxes, only in one of two ways, viz.:

1. Either by actual payment of such taxes at Antwerp;

2. or by actual shipment of the goods pursuant to the provisions of the treaty out of the Kingdom of Belgium.

In either case the shipment was compelled to remain in the custody of the Government for the protection of its lien until one of these two conditions had been fulfilled.

Hartman v. Bean, supra.

There is no pretense or claim that any of the parties intended that the shipment should be released from the lien of the Belgian Government by actual payment of the revenue tax at Antwerp, and the case stated expressly affirms that the parties intended and agreed otherwise.

It conclusively appears, therefore, upon the case stated, that the shipment was compelled to remain in the custody of the Belgian Government, as security for the payment of its lien for taxes, until the shipment was actually sent out of its jurisdiction.

When the authorities of Belgium took the shipment at Sterpenich (the Belgian border), the

taking was equivalent to a *seizure* of the same and it was thereby placed in custody of the Belgian Sovereignty, as security for the payment of the Government lien thereon.

The summary proceedings which the customs officers were required to take against the goods were in the nature of proceedings *in rem* on the part of Belgium,

United States v. Cobb, 11 Federal Rep. 79,

and the Government warehouse was *an agency of the Government of Belgium,* and not like a free or private warehouse.

George v. Fourth National Bank of Louisville, 41 Federal Reporter 263.

The shipment, therefore, having been duly seized by the proper Belgian Government officials, as security for the payment of the lien of their Government for taxes, and the same having been duly deposited by them in the proper Government warehouse to secure such lien, was, at the time of its destruction, in custody of law.

> "Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after

deducting the usual rate of storage at the port, with all other charges and expenses including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying the appropriate expenses."

Case No. 2831, 5 Federal Cases, p. 903.

"From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act."

Case No. 7424, 13 Fed. Cases, p. 884. Citing and applying

Harris v. Dennie, (3 Peters) 28 U. S. 290, 304.

V.

THE CASES RELIED ON BY THE DEFENDANT IN ERROR.

We do not question the soundness of the legal principles laid down, and the conclusions reached, by the courts in the cases particularly relied on by defendant in error and specially cited and referred to in the appendix to its brief; but we deny their applicability to the case at bar, because, as

we contend, the case at bar presents an entirely new and special state of facts.

Three of the cases, however, do—one inferentially, and the other two directly—point to the conclusion that where a carrier has surrendered the custody and possession of freight carried by it to the sovereignty, i. e., the government customs officials, it is relieved from the insurance liability.

In the case of

Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. 386,

(Appendix to Brief of Defendant in Error, Case "C", p. viii), where the defendant was held liable for the loss of a shipment of oil which it had failed to deliver to the consignee, which it had stored in its own yard, and where it appeared that delivery could, in any event, not have been made by it until the customs duty was paid, the court, pointing out to the defendant how it could have escaped the common law liability as an insurer, at page 392, said:

> "If, as seems to have been the case, the governmental power, prevented the carriage of the oil to its destination until the duties were paid, then it was appellee's duty to take all practicable means to notify the consignees and failing in that to notify the shippers of the situation. *Meanwhile, appellee was at liberty to turn the oil over to the customs officers,* or to store it in a suitable and reasonably safe place."

From the language of the court the inference seems to be justified that if as a fact the railroad company had turned the shipment over to the

customs authorities, it would have exonerated itself from the insurance liability.

In the cases of

Parker v. North German Lloyd S. S. Co., 76 N. Y. 806

(Appendix to Brief of Defendant in Error, Case "D", p. xiii), and

Howell v. Grand Trunk Ry. Co., 36 N. Y. Supp. 544,

(Appendix to Brief for Defendant in Error, Case "E", p. xv), where the goods involved were destroyed while in the custody of the customs authorities, the carriers were held not liable as insurers.

And in the case of

C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285,

(Brief for Defendant in Error, p. 55), cited and discussed in Pennsylvania Co. v. Canadian Pac. Ry. Co., *supra,* the defendant who carried bonded goods, was held liable because he *failed* to deliver them promptly into the possession of the customs officials.

In the case at bar we claim: That by reason of the International Treaty the shipper of the cheese in question, the agent of the buyer and importer (the Defendant in Error) was *compelled* to deliver it into the exclusive possession and custody of the Belgian government the moment it entered Belgian territory and that such possession and custody by that government *could not be divested,* irrespective of the question whether the goods were immediately

carried forward from the railroad depot at Antwerp upon their arrival there and placed on board the Sardinian Prince, or whether, they were temporarily held in storage—whether in the Royal Government warehouse or on the wharf—until the very moment they were placed in the hold of such vessel, and that not until then was the possession and custody and complete control of the goods delivered to the plaintiff in error and not until then did its liability as an insurer become fixed.

In the case of

Schieffelin v. Harvey, 6 John. 170, 5 Am. Dec. 206,

(Appendix to Brief of Defendant in Error, Case "F", p. xvii), the carrier was held liable as an insurer for the loss of the shipment, notwithstanding the fact that English customs officers were on board the vessel containing it, upon the distinct ground, as will appear from a careful reading of the following part of the decision of the court:

> "It is said that the nutmegs must have been stolen by the custom house officers, while they were on board the ship and had access to them in order to prevent them from being smuggled on shore. But this is no excuse. It was the duty of the master to guard against such accidents; and if he has neglected to do it, or been so unfortunate as not to detect the theft, if one was committed, he and not the shipper must bear the loss. This was one of the risks which he agreed to assume; and he must have known that some persons, in all probability, would be stationed on board, to guard against any attempt to run the goods, because such a precau-

> tion was both reasonable and right. *The master was left in full control of the ship, and his control over her and her cargo, except as it related to the landing of the goods in question, was as complete as if the custom-house officers had not been on board.*"

There the carrier had complete physical possession and control of the shipment, whereas in the case at bar the possession never was and could not be in the carrier prior to the destruction of the shipment.

We respectfully submit that the judgment of the court below should be reversed.

Dated, San Francisco,
June 15, 1915.

Respectfully submitted,

CURTIS H. LINDLEY,
HENRY EICKHOFF,
EMIL POHLI,
Attorneys for Plaintiff in Error.

No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error,
(Plaintiff below).

PETITION FOR A REHEARING.

CURTIS H. LINDLEY,
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Mills Building, San Francisco,
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Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,
Defendant in Error,
(Plaintiff below).

PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error presents this, its petition for a rehearing of the appeal in the above-entitled action, and respectfully urges the following contentions in favor of its petition:

Referring to the transcript of record, it will be seen that plaintiff in error was sued for the

value of a shipment of merchandise which was destroyed by fire (not due to any fault or negligence of plaintiff in error) while the same was in transit in bond for export through the Kingdom of Belgium, and which shipment was at the time of its destruction compulsorily in the physical uninterrupted, exclusive possession, control and custody of the Customs Authorities of the Kingdom of Belgium, pursuant to the provisions of an International Treaty.

All the parties concerned contemplated that the shipment involved should be a shipment in bond for export from Switzerland to America, pursuant to the provisions of the International Treaty.

Transcript, pp. 12 et seq.

Upon the arrival of the shipment in Belgium, the same, pursuant to the provisions of the treaty, was seized and taken into the custody of the Belgian Governmental Authorities to protect their lien for duties possibly payable until the shipment was exported out of Belgium.

The court in its opinion rendered herein declares that upon the arrival of the goods at Belgium the consignee had *three* courses available to him, one being that it could pay the duties upon the shipment and thereupon take the goods into its own possession. We think this statement of the court is an inadvertence or an error, because the agreement of the parties contemplated only a through shipment in bond for export. If the consignee had paid the Belgian duties, the payment would have represented a total loss to it. Such payment of duties and withdrawal of the goods

would have been contrary to the agreement and contemplation of the parties, and therefore plaintiff in error would not have been entitled to recover the amount of the duties from any one.

The statement of facts is clear on this point.

> "But it was his (Debenhams) duty *to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty.* The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. *Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action.*"
>
> Transcript of Record, pp. 13 and 14.

It follows then that the parties contemplated that the goods (in bond for export) throughout their presence in Belgium, were to remain in the uninterrupted, exclusive official custody of the Government customs authorities of Belgium.

Transcript of Record, p. 19.

The goods were in such custody at the time when they were destroyed.

Transcript of Record, p. 21.

Upon this state of facts we contend that the case at bar is a novel one to which the general rules heretofore applied to control the liability of carriers in ordinary cases *are not applicable;* therefore the court should determine the controversy independently of the old inapplicable rules.

Reading the opinion on the decision of the appeal in this case, we beg leave to contend that the court concluded this point somewhat summarily, and that the point is one of weight and importance, which upon more considerate study would perhaps have been differently disposed of by the court.

The rule according to which extraordinary liability is charged upon common carriers is based upon the reason that such carriers are given exclusive possession, charge and control of goods, and therefore have great temptation and power to be dishonest.

> "The same reason holds to charge them in this case as to charge carriers, inn keepers and the like, *videlicet* the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would be under to embezzle goods intrusted to them without possibility of proving a particular neglect."
>
> Lane v. Cotton, 12 Mod. 472 (482).

See also

> Coggs v. Bernard, 2 Ld. Raym., 909, 918; and Riley v. Home, 5 Bing. 217.

Now in the case at bar, the reason assigned for the liability of a carrier as an insurer does not exist. It can not be claimed that the carrier had any such active possession or control of the shipment as might afford temptation or opportunity to embezzle the goods, therefore it had no temptation or power to embezzle or miscarry the shipment.

Accordingly we contend that the general rules relative to carriers are not and can not be made applicable to this case.

The reason for applying the rule having ceased, the rule itself fails of application.

> "When the reason of the rule ceases, so should the rule itself."
>
> Civil Code of California, Section 3510;
>
> Katz v. Walkinshaw, 141 Cal. 116, 123.

> "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails."
>
> People v. Appraisers, 33 N. Y. 461;
>
> Beardsley v. Hartford, 50 Conn. 541, 542; 47 Am. Rep. 677.

Again, a carrier is not liable for goods taken from him and placed in the custody of the law, and the shipment here involved was in the custody of the law. The place in which the goods are kept is not of controlling importance, "but the custody of the government and the consequent ex-

clusion of control over them by the owner" is the essential fact.

Hartrenft v. Oliver, 125 U. S. 525, 527.

As soon as the shipment was introduced or entered into Belgium, duties became payable on it to the Belgium Government and continued to be payable until the shipment was exported pursuant to the Treaty.

U. S. v. Ehrgott, 182 Federal Rep. 272.

Therefore, upon the case stated, the shipment according to the express agreement of the parties, was compelled to remain in the custody of the Belgian Government, as security for the payment of its lien for taxes, until the shipment was actually sent out of its jurisdiction.

When the authorities of Belgium took the shipment at Sterpenich (the Belgian border), the taking was equivalent to a *seizure* of the same and it was thereby placed in custody of the Belgian Sovereignty, as security for the payment of the Government lien thereon, the summary proceedings which the customs officers were required to take against the goods being in the nature of proceedings *in rem* on the part of Belgium.

United States v. Cobb, 11 Federal Rep. 79,

and the Government warehouse was *an agency of the Government of Belgium,* and not like a free or private warehouse.

George v. Fourth National Bank of Louisville, 41 Federal Reporter, 263.

Our claim is that the shipment, having been duly seized by the proper Belgian Government officials, as security for the payment of the lien of their Government taxes, and the same having been duly deposited by them in the proper Government warehouse to secure such lien, was, at the time of its destruction, in custody of law.

> "Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying the appropriate expenses".
>
> Case No. 2831, 5 Federal Cases, p. 903.

> "From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or

controls that custody, is a virtual violation of the provisions of the act".

Case No. 7424, 13 Federal Cases, p. 884;

Citing and applying

Harris v. Dennie (3 Peters), 28 U. S. 290, 304.

Again, defendant in error in its brief contends that the detention of the shipment in the warehouse was for the convenience of plaintiff in error, and the court appears to have accepted this contention as being well founded. But we think the record, fairly construed, makes no statement or inference from which such a conclusion is deducible. Mr. Debenham wrote (page 16 of transcript) to have the shipment arrive at Belgium toward the end of the month, for very probably there would be a sailing for Montreal *by the end of the month* or on *one of the first days of June*, and again the shipment should arrive not later than June 3d, because the ship was to sail on June 5th. In each instance a delay of several days was contemplated. Necessarily, and in the ordinary course of events, we think there must have been some delay between the arrival of the train bearing the shipments and its lading on board the ship. It surely was not contemplated that the shipment could or would be transferred from the train to the ship *instanter*. If the principle declared in the opinion be correct, plaintiff in error would be chargeable for the shipment from the very instant when the bill of lading

was delivered to Debenham even if the train bearing the shipment were at that very moment under way to the ship's side, where facilities for immediately embarking it were ready and awaiting its arrival.

The statement of facts sets forth that the receipt by Debenham of the shipment here involved was only a qualified one, for the special purposes shown (page 13 transcript), viz., *only to the extent that such shipments could be received by any one at Antwerp* in accordance with the provisions of the treaty. No attempt is made to show by the record, or in the agreed statement of facts, that the shipment was unnecessarily or unreasonably detained in Government custody at Antwerp, and surely there is no presumption against the carrier in this case. A good way to test the principle involved is to transpose conditions. Suppose that the train carrying the shipment had been delayed by some accident in transit, so as to arrive at Antwerp too late for lading on the steamer for which it was intended. Mr. Debenham, upon arrival of the goods at Antwerp, would have exchanged the same papers as in this case, and the goods would have been similarly warehoused. Could it then have been contended that this action on the part of Debenham constituted such a complete and absolute delivery of the shipment as would charge defendant as carrier.

We press this point, because we believe the record develops no fact or circumstance tending to

show that defendant is sought to be charged upon the theory that the embarkation of the shipment was not effected within a reasonable time after its arrival at Antwerp.

We believe that the contention seeking to charge the carrier in this action upon the theory that the storage of the shipment in the Government bonded warehouse was solely for the convenience of the carrier is an afterthought, a claim which was never intended to be of the gist of this action.

Defendant in error in its brief candidly states the controlling issue on this appeal as follows:

> "The whole case revolves upon the single question * * * whether the goods at the time of their destruction were in the possession of the defendant as a common carrier. Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not".
>
> Brief of Defendant in Error, p. 7.

And the statement of facts, after stating that Mr. Debenham could receive the goods only to the limited extent specified (page 13 of transcript), proceeds:

> "but it was his duty to *receive* and *forward* such shipments of merchandise as aforesaid *only to the extent* and *in the sense* and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium for export * * * *might be received* by any one at Antwerp, to be thence forwarded under the treaty", etc.
>
> Transcript of Record, p. 14.

We think the situation would have been different if the goods had been destroyed *in transit* while they were in cars which the carrier operated and physically controlled, or in warehouses representing agencies of the carrier, and some of the authorities cited by our opponents are in point as to such situations. But we think the whole situation and relationship of the parties was changed as soon as the shipment was impounded in the absolute exclusive, physical possession, custody and control of the Government. The carrier then had only the right to call for a delivery to him of the goods, but until such delivery had been made the carrier had not a single element of possession, custody or control. It is not a case where the deposit of the shipment was accessory to its carriage within the meaning of the precedents on this point, but a case in which the deposit was compulsorily made into governmental custody, according to an exceptional arrangement expressly arranged by the parties to avail themselves of the treaty benefits, such deposit being in fact and in principle for the *convenience of both parties.* The deposit was at a place where the property under the treaty and Belgian law could be impounded and was impounded in the custody of the law, to protect the lien of the Government for its duties if the shipment went no further, and to avoid payment of the duty if they were shipped out of the kingdom.

On principle the case seems to be without precedent and of novel aspect, presenting the new

question: who in contemplation of the law has the actual legal possession of goods actually physically deposited in the exclusive governmental possession, custody and control of a Government to protect its lien for duties?

We think this question is one of importance and general interest, and should be clearly decided, and therefore urge that this petition be granted.

Dated, San Francisco,
October 30, 1915.

Respectfully submitted,
CURTIS H. LINDLEY,
HENRY EICKHOFF,
EMIL POHLI,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EMIL POHLI,
Of Counsel for Plaintiff in Error and Petitioner.

No. 2585

United States

Circuit Court of Appeals

For the Ninth Circuit

THOMAS M. SHIELDS,
Plaintiff in Error,

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant in Error,

Transcript of Record

Writ of Error to THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Filed
MAR 19 1915
F. D. Monckton,
Clerk.

Central Publishing Co., Printers, Seattle.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS M. SHIELDS,
Plaintiff,
in Error,

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
in Error,

Transcript of Record

Writ of Error to THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Central Publishing Co., Printers, Seattle.

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In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*

No. 2527

NAMES AND ADDRESSES OF COUNSEL.

EDGAR S. HADLEY, Esq., Attorney for Plaintiff in Error, 304 Pioneer Building, Seattle, Washington.

WILL H. THOMPSON, Esq., Attorney for Plaintiff in Error, Lyon Building, Seattle, Washington.

GEORGE D. EMERY, Esq., Attorney for Defendant in Error, 419 Central Building, Seattle, Washington.

In the United States District Court, Western District of Washington, Northern Division

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.

No. 2527

AMENDED COMPLAINT.

It having been stipulated and agreed between the parties to this action, through their respective attorneys, that the plaintiff might file in this action his amended complaint. Now, therefore, as a cause of action against the defendant this plaintiff alleges as follows, to-wit:

I.

That the defendant, the Columbia River Lumber Company, during all the times mentioned in this complaint was and is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is qualified to do business in the State of Washington.

II.

That on and prior to the 23rd day of August, 1911, the defendant was the owner of certain timber and timber lands situated in Chelan County in the State of Washington, and was desirous of selling said property, and in order to negotiate the sale of said property employed one Thomas Winsor to act as their agent.

III.

That the said Thomas Winsor, acting under his said employment, in writing negotiated for and on behalf of

said defendant, the sale of said property, timber and timber lands, to one F. P. Kellogg, for a corporation to be thereafter organized by him; and thereupon, said defendant entered into an agreement, in writing, with said Thomas Winsor, for the delivery to the Union Trust Company, of Chicago, Illinois, for said Thomas Winsor, in consideration of his services, $10,000.00 of stock of said corporation to be organized by the said F. P. Kellogg, which corporation was organized in pursuance of said agreement and is known as the "F. P. Kellogg Lumber Company"; a copy of which agreement in writing is hereto attached and marked "Exhibit A", and made a part of this complaint, the same as if in this paragraph set out in full.

IV.

That such things were had and done in pursuance of said agreement "Exhibit A" and the agreements therein referred to, by the defendant and F. P. Kellogg; that the F. P. Kellogg Lumber Company was organized as a corporation to take over said property, and the defendant transferred and delivered to it the property, timber and timber lands herein referred to, and mentioned and described in said "Exhibit A" and in the agreements therein referred to; and yet the defendant has failed and refused to deliver to said Union Trust Company of Chicago, Illinois, in pursuance of said agreement "Exhibit A", or to said Thomas Winsor, or to anyone acting in his behalf, the said $10,000. in shares of stock of the said F. P. Kellogg Lumber Company, or to in any manner compensate him therefor; that said defendant has obtained from said

F. P. Kellogg and the F. P. Kellogg Lumber Company all the capital stock of the said F. P. Kellogg Lumber Company, including the $10,000.00 shares of stock to be held for the benefit of said Thomas Winsor, and has wrongfully converted the said shares of stock, of the value of $10,000.00, to its own use and benefit, and now maintains and asserts that neither said Thomas Winsor, nor this plaintiff claiming under him, is entitled to any compensation whatsoever for the said services of said Thomas Winsor upon behalf of the defendant, whereby said stock has become wholly lost to the plaintiff, to the damage of the plaintiff $10,000.00 with interest thereon at six per cent. from the 23rd day of August, 1911.

V.

That on the 25th day of April, 1913, for value received, said Thomas Winsor duly sold, assigned and set over all of his rights and claims against the defendant to this plaintiff who is now the owner thereof.

Wherefore, plaintiff prays judgment against the defendant in the full sum of $10,000 with interest thereon at 6 per cent. per annum from the 23rd day of August, 1911, and for such other and further relief as to the court shall seem just and equitable.

EDGAR S. HADLEY,
Attorney for Plaintiff.

State of Washington, County of King, ss.

The undersigned, being first duly sworn on oath, says: I am the plaintiff named in the foregoing complaint; that I have heard the same read, know the contents thereof and believe the same to be true.

THOMAS M. SHIELDS.

Subscribed and sworn to before me this 20th day of September, 1913.

(Seal.) EDGAR S. HADLEY,

Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A."

Seattle, Washington, August 23, 1911.

Union Trust Company, Chicago, Illinois:

Gentlemen: The undersigned Columbia River Lumber Company, a corporation, F. P. Kellogg, Thomas Winsor and R. H. Steeves have agreed as is below stated, and direct you to make certain payments and disposition, as is embodied in this instrument, upon behalf of all the parties concerned.

Reference is hereby made to an agreement dated August 23, 1911, between the Columbia River Lumber Company and F. P. Kellogg wherein the Columbia River Lumber Company have, upon the terms in said agreement mentioned, agreed to sell to F. P. Kellogg certain properties located in Chelan County, Washington, for the agreed price of $225,000; also a certain escrow agreement dated August 23rd, 1911, directed to you as the escrow agent, providing for the payment by Kellogg, or his assigns, a corporation to be organized as is provided in the agreement above mentioned, to you as escrow agent for the benefit of the Columbia River Lumber Company $225,000, the purchase price of said properties. Reference is made to the above two agreements the same as if the terms of said agreements were here set out in full.

Now, therefore, in consideration of the services rendered by Thomas Winsor and R. H. Steeves in negotiating and effecting a sale of said property, the Columbia River Lumber Company have agreed in event of said Kellogg's carrying out completely the said proposed sale to pay as a commission for perfecting said sale the sum of $15,000 in manner and form: Now you are hereby requested and directed that when the certificate of stock mentioned in said agreements are delivered to you by F. P. Kellogg, or his assigns, for the benefit of the Columbia River Lumber Company, to set over and hold for the benefit of Thomas Winsor $10,000 worth of said certificates, and for the benefit of R. H. Steeves $5,000 worth of said certificates, and when the cash shall be paid to redeem said certificates and the interest thereon, you are hereby further directed to pay to Thomas Winsor of Seattle, Washington, the sum of $10,000 plus the interest at 6 per cent. accrued thereon, and further to pay to R. H. Steeves $5000 together with the interest accrued thereon at 6 per cent.; said amounts to cover all the claim or claims of the said Thomas Winsor and R. H. Steeves against any of the parties to said transaction on account of commissions for the negotiating and completing of sale of said property, the same to be deducted as hereinabove stated from the amounts to be turned over by you to the Columbia River Lumber Company, and the amount of the escrow agreement entered into between F. P. Kellogg and the Columbia River Lumber Company is varied to the amount of $15,000.

COLUMBIA RIVER LUMBER COMPANY,
By GEORGE H. SELOVER,
Its President.

(Corporate Seal.)

By GEORGE B. DARLING,
Its Secretary.

F. P. KELLOGG.
THOMAS WINSOR.
R. H. STEEVES.

Service of the within Amended Complaint by delivery of a copy to the undersigned is hereby acknowledged this 27th day of September, 1913.

ARTHUR W. SELOVER and
E. M. FARMER,
Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 2, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
No. 2527

ANSWER.

Comes now the above named defendant and in answer to the amended complaint of the plaintiff, states and alleges as follows, to-wit:

I.

The defendant admits the allegations contained in Paragraph I of said amended complaint.

II.

The defendant admits that on and prior to the 23d day of August, 1911, the defendant was the owner of certain timber and timber lands situated in Chelan County, in the State of Washington, and admits that it was desirous of selling said property. That defendant denies that in order to negotiate the sale of said property that the defendant employed one Thomas Winsor to act as its agent and denies that it employed Thomas Winsor to act as its agent in any capacity.

III.

Defendant denies that Thomas Winsor, acting under its said employment or at all, in writing or at all, negotiated the sale of said property for and on behalf of said defendant to one F. P. Kellogg, or to any person whatsoever, and denies that the defendant entered into an agreement in writing or at all with said Thomas Winsor for the delivery to the Union Trust Company, of Chicago, Illinois, for said Thomas Winsor in consideration of his services 10,000 shares of stock of any corporation to be organized by said F. P. Kellogg or any other person. Defendant denies that the copy of an agreement attached to the amended complaint and marked Exhibit "A" was ever delivered to Thomas Winsor or any person for said Thomas Winsor, and denies that there ever was any consummation of an agreement between said defendant and said Thomas Winsor, as set forth in Exhibit "A".

IV.

Defendant denies each, every and all of the allegations contained in Paragraph IV of said amended complaint. Defendant denies that the things set forth in Paragraph IV of said amended complaint were had and done in pursuance of said agreement marked Exhibit "A". Defendant admits that it has failed and refused to deliver to said Union Trust Company of Chicago, Illinois, or to said Thomas Winsor or to anyone acting in his behalf, 10,000 shares of the capital stock of said F. P. Kellogg Lumber Company, but denies that it has failed and refused to make said delivery by reason of said agreement marked Exhibit "A" or in pursuance thereof. Defendant denies that it has obtained from said F. P. Kellogg or the F. P. Kellogg Lumber Company, all of the capital stock of said F. P. Kellogg Lumber Company, including the 10,000 shares of stock to be held for the benefit of Thomas Winsor, and defendant denies that it has wrongfully converted said shares of stock or any shares of stock to the sum of $10,000.00 to its own use and benefit belonging to Thomas Winsor or to anyone for him or claiming under him. Defendant admits that it now does and always has maintained and asserted that neither said Thomas Winsor nor this plaintiff claiming under him is entitled to any compensation whatsoever from this defendant for and on account of services rendered by said Thomas Winsor in behalf of said defendant, and defendant denies that said stock has become wholly lost to plaintiff and that plaintiff has been damaged to the sum of $10,000 or any sum whatsoever.

V.

Defendant denies each, every and all allegations contained in Paragraph V of the amended complaint.

Further answering said amended complaint and as and for an affirmative defense thereto, defendant alleges as follows:

I.

Defendant alleges that on or about August 23, 1911, certain tentative agreements mentioned in "Exhibit A" attached to said amended complaint regarding the sale and disposition of the property herein mentioned to F. P. Kellogg were drawn up and executed. That prior to the deliver yof any of said agreements or Exhibit "A", as set forth in the amended complaint, the said F. P. Kellogg absolutely refused, failed and neglected to carry out his part of said agreements and notified the said defendant company that he was unable and unwilling to carry out said agreements. Thereupon all negotiations between the parties therein mentioned ceased, and it was mutually agreed and understood by all parties thereto that all of said agreements and writings in reference thereto were null and void, and should be considered cancelled and null and void from then henceforth.

II.

That the above named plaintiff was at all times familiar with the negotiations and transactions had between the said F. P. Kellogg and the defendant corporation, and the said Thomas Winsor, and was well informed of the cancellation of all of said agreements and writings.

Wherefore, defendant prays that the plaintiff take

nothing by this action and that the defendant have and recover a judgment against the plaintiff for its costs and disbursements herein.

ARTHUR W. SELOVER,
E. M. FARMER,
Attorneys for Defendant.

State of Washington, County of King, ss.

The undersigned, being first duly sworn, on oath says: I am one of the attorneys for the defendant named in the foregoing answer; that I have heard the same read, know the contents thereof and believe the same to be true. That the reason that I verify this answer instead of one of the officers of said corporation is that none of the officers of said corporation are at present within the State of Washington and within the jurisdiction of the United States District Court, Western District of Washington, Northern Division.

E. M. FARMER.

Subscribed and sworn to before me this 2d day of October, 1913.

(Seal.) WM. M. THOMASSON,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

Service of the within Answer by delivery of a true copy to the undersigned is hereby admitted this 2d day of October, 1913.

EDGAR S. HADLEY,
Attorney for Plaintiff.

Indorsed: Answer: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 4, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
No. 2527

REPLY.

Comes now the plaintiff and by way of reply to the affirmative answer of the defendant alleges as follows, to-wit:

I.

He denies that part of Paragraph I of said affirmative defense which alleges that the agreement set forth in plaintiff's complaint, and marked Exhibit A, was a tentative agreement and denies that said agreement was any other agreement than is set forth in plaintiff's complaint, and denies each and every other allegation in said paragraph contained, and the whole thereof.

II.

He denies each and every allegation and thing set forth in Paragraph II of plaintiff's affirmative defense, and the whole thereof.

EDGAR S. HADLEY,
Attorney for Plaintiff.

State of Washington, County of King, ss.

The undersigned, being first duly sworn, says: I am the Pltf. named in the foregoing Reply; that I have heard

the same read, know the contents thereof and believe the same to be true.

THOMAS M. SHIELDS.

Subscribed and sworn to before me this 1st day of Nov., 1913.

EDGAR S. HADLEY,

Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 2, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff*,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant*.
F. P. KELLOGG, *Intervenor*.
No. 2527

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that the intervenor, F. P. Kellogg, may dismiss his complaint in intervention without prejudice and without costs.

EDGAR S. HADLEY,
Attorney for Plaintiff.

GEO. D. EMERY,
Attorney for Defendant.

J. Y. C. KELLOGG,
Attorney for Intervenor.

Indorsed: Stipulation. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 21, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*

F. P. KELLOGG, *Intervenor.*

No. 2527

ORDER OF DISMISSAL.

This cause coming on for hearing this —— day of July, 1914, and it appearing to the Court that all of the parties hereto have stipulated that the intervenor, F. P. Kellogg, may dismiss his complaint in intervention without prejudice and without costs, and that said intervenor has moved the court for such dismissal; it is hereby ordered and decreed that the complaint in intervention of said F. P. Kellogg be, and the same hereby is dismissed without prejudice and without costs.

Done in open Court this 21st day of July, 1914.

JEREMIAH NETERER, Judge.

Indorsed: Order of Dismissal: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 21, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff*,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant*.
No. 2527

TRIAL.

Now on this day this cause comes on regularly for hearing in open Court, Edgar S. Hadley and Will H. Thompson appearing for the Plaintiff, and Geo. D. Emery appearing for the Defendant, whereupon a jury being called come and answer to their names as follows: George Pursey, A. J. Snyder, August Nylin, E. C. Moore, R. C. Erskine, A. G. Keene, C. V. Beardslee, E. R. Engstrom, John W. Holway, Robert McGough, G. A. Voris and J. B. Seavy, twelve good and lawful men duly empaneled and sworn, the cause proceeds by plaintiff making opening statement to jury and examination of the following witnesses: Chas. A. Murray, Thomas Winsor, C. R. Aldrich, F. P. Kellogg and Thomas Winsor recalled, and the introduction of the following exhibits: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22. And now the hour of adjournment having arrived, by consent of parties, it is ordered by the Court that this cause be and is hereby continued until ten o'clock tomorrow morning, and the Court having cautioned the jury in this case they are allowed to separate until that hour. Dated July 21, 1914. Journal 4, Page 152.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
No. 2527

TRIAL.

Now on this day this cause coming on, Edgar S. Hadley and Will H. Thompson appearing for the Plaintiff and Geo. D. Emery appearing for the Defendant, the jury being called, all being present in their box, the cause proceeds by plaintiff resting its case and defendant moves for non-suit. Motion is argued by respective counsel, and the Court being sufficiently advised grants said motion and the jury is excused from further consideration of the cause. Plaintiff excepts to ruling of Court and exception is noted. Dated July 22, 1914.

Journal 4, Page 153.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
F. P. KELLOGG, *Intervenor.*
No. 2527
Filed July 23, 1914

ON MOTION FOR NON-SUIT GRANTED.

EDGAR S. HADLEY, for Plaintiff.

GEORGE D. EMERY, for Defendant.

J. Y. C. KELLOGG, for Intervenor.

NETERER, District Judge—Orally:

The plaintiff's right of recovery in this case must be predicated upon the agreement which bears date August 23, 1911. This agreement makes another memoranda of even date, executed between the defendant company in this case and F. P. Kellogg, a part of it by reference thereto. I think the recitals in the agreement in which the plaintiff in this case, or his assignor, Mr. Thomas Winsor, was a party, would take the case out of the statute of frauds as defined by the legislature of Washington, where it is provided in substance that contracts for the sale of real estate or any agreement, contract or promise with reference thereto shall be void unless such agreement, contract or promise, or some note or memoranda thereof, be in writing, or signed by the party to be charged or by some person thereunto lawfully authorized. That is to say, it refers to paragraph five of the section of the act where it provides that an agreement authorizing an agent or broker to sell or purchase real estate upon compensation or commission, and then provides what shall be set out in the authorization before it can support an action for a commission. This contract presupposes a consummated arrangement, and that all of the acts defined there have been, so far as the testimony is concerned, carried out, and the contract is really an executed one, and the stock set out in this agreement has been issued and is held by the defendant pursuant to an arrangement between the parties, and that this stock has been converted to the use of the defendant. The memoranda entered into between Kellogg and the defendant

company recites what shall be done in the organization of the corporation which was contemplated, and likewise provides for the payment to the defendant of the consideration for the lands in issue. It provides for compensations that were to be paid to Mr. Kellogg for his work in the operation and management of the concern that was to be organized and which was to handle the output from the lands of the defendant company until it became the property of Mr. Kellogg. The testimony shows that Mr. Kellogg did not pay anything himself for this property. It shows further that the terms and conditions of that agreement were not carried out. They were abandoned and a new plan was adopted by the parties afterwards. I don't think that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and if the plan which was adopted in this case was substantially the same as the original plan, the plaintiff in this case would be entitled to his compensation, if he was the agency which brought the parties together, and if the parties carried out the agreement which was entered into as understood by the parties.

Now, when I read this memoranda that was signed by all of these parties, there is one thing that immediately challenges my attention, and that is that in this typewritten conract there was something that was originally omitted from the memoranda which was before the minds of the parties at the time it was made, and it was a matter which was considered very material at the time, and that is the insertion after the word "agreed," following the words, "The Columbia River Lumber Company has

agreed," which insertion is as follows: "In the event of said Kellogg's carrying out completely the said proposed sale," and then the writing as originally made concludes, "To pay as a commission for perfecting said sale the sum of $15,000." Then follows another insertion, "In manner and form following," and then follows the way and manner in which this shall be paid, and provides for the deposit of the stock of the company in the Union Trust Company to be held for the benefit of Winsor, and likewise for the benefit of R. H. Steeves—$10,000 for Winsor and $5,000 for Steeves. This stock was not to be paid to these parties. If it had been considered that they were entitled to anything at that time the stock would have been delivered to the parties instead of putting it in the Union Trust Company. But there was still something to follow and what was to follow was simply what was interlined there, the carrying out of the proposed sale by the payment of the money and then the Union Trust Company was authorized to pay to these parties, not the stock, but the money, when it was paid by Kellogg. Now, then, in the memoranda that was made by Winsor on May 7, 1912, he says that he is willing that the Columbia River Lumber Company shall hold the stock instead of the Union Trust Company, and therefore, as the testimony shows here, I concluded that the Columbia River Lumber Company has this stock and is still holding it. Mr. Kellogg has stated that he hasn't paid anything; that he has abandoned the property; that he was short of funds and needed more funds and the parties have declined to advance him more funds, and that then it was concluded that he better

surrender all of the property, which he did, and did not receive a cent for it; never paid a cent in, and never got a cent out, other than his compensation. Much emphasis has been placed upon the fact that this company was called the Kellogg Company and that the transfer of the land to that company now is carrying out the original plan. Now the testimony here does not appear to me to bear out that construction. The only fact that could possibly suggest such a conclusion is the fact that it is now the Kellogg Lumber Company. It would be immaterial whether this company was the Kellogg Lumber Company or another lumber company. The right of the plaintiff would not be any greater than if it was called the Thompson Lumber Company, because the defendant company owns all of the stock. It even owns the one share which was given to Mr. Kellogg to qualify him to act as the trustee. He says that the stock was issued to him and he endorsed it and delivered it back to the company. Now, I could not instruct the jury on any proposition of law known to me which would authorize a recovery in this case. It would simply be authorizing the plaintiff to recover in this case because the defendant organized, or permitted the organization of a company to hold these properties and for employing Mr. Kellogg to manage and operate the concern and pay him for it, and giving him the opportunity of buying the preferred stock of the concern, and that would be all. The defendant company still owns all of the property just the same as it did before, except that it has it in another form or name. I do not think from the evidence in this case that the plaintiff

is entitled to recover. I appreciate that the plaintiff has done much service, but the court cannot make contracts. The contract here is definite and clear, and while there might have been some doubt as to its meaning, the direct expression is inserted by pen, which provides when these matters shall be paid and that they shall be paid only upon the completion of the carrying out of the plan or arrangement. I think the motion must be granted. You may call in the jury.

I might add that I think the Bishop case, in 17 Washington, is clearly distinguishable from the facts in this case. There the parties made a sale, and the buyer paid a part of the consideration himself and entered into the operation of the property and made payments from the output of the mine, and afterwards the parties agreed upon another disposition for a valuable consideration which was satisfactory to both wherein the money was paid and passed between the parties themselves rather than through the bank, and the court rightly held in that case that the parties could not, in that sort of fashion, defeat the party from receiving consideration for services rendered. But this case is different in that the defendants here always had and still have all of the property, but only in another form.

Instructions to Jury.

You, gentlemen of the jury, are instructed that the defendant having moved for non-suit in this case, and it appearing that there is not sufficient evidence upon which to predicate a verdict, the court has granted the motion. There is no evidence in this case, as I construe the law,

which could support a verdict, and you are therefore excused from further consideration in this case, and until ten o'clock to-morrow morning.

To which the plaintiff excepts and the exception is noted.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff.*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
No. 2527

MOTION FOR NEW TRIAL.

Comes now the plaintiff and moves the court to grant and allow a new trial in the above entitled action upon the following grounds and for the following reasons:

I.

That the Court erred in granting the motion of the defendant for a non-suit and in refusing to submit the evidence offered by the plaintiff to substantiate his cause of action to the jury.

WILL H. THOMPSON,
EDGAR S. HADLEY,
Attorneys for Plaintiff.

Service of the within Motion for New Trial by delivery of a copy to the undersigned is hereby acknowledged this 23d day of July, 1914.

GEO. D. EMERY,
Attorney for Deft.

Indorsed: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff.*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
No. 2527

ORDER DENYING NEW TRIAL.

This cause came duly before the Court on July 23rd, 1914, on motion of plaintiff for a new trial thereof, on the grounds set forth in the motion on file herein.

Edgar S. Hadley and Will H. Thompson, Esqs., appeared for the plaintiff, and Geo. D. Emery, Esq., for the defendant.

After hearing counsel and considering said motion it is Ordered:

That said motion be and the same is in all things denied.

The plaintiff duly excepted hereto.

Dated July 23rd, 1914.

By the Court:

JEREMIAH NETERER, Judge.

Indorsed: Order Denying New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*

No. 2527

JUDGMENT.

The above entitled cause having been dul ytried on July 21st and 22d, 1914, before the court and a jury, and the said court having upon the motion of the defendant at the close of plaintiff's case, ordered and directed that judgment of non-suit be entered therein against the said plaintiff, at its cost:

Now, therefore, on motion of George D. Emery, attorney for the defendant, and pursuant to the said order of court on file herein,

It is by the Court considered and adjudged that the said cause be and the same is hereby dismissed for want of sufficient proof of facts to constitute a cause of action.

It is considered and adjudged further that the defendant have and recover of and from the plaintiff its costs and disbursements to be taxed and inserted herein.

By the Court.

Dated this 23d day of July, A. D. 1914.

JEREMIAH NETERER, Judge.

O. K. as to form: EDGAR S. HADLEY.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western Division of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*

No. 2527

STIPULATION.

It is hereby stipulated by and between the attorneys for the plaintiff and the attorneys for the defendant in the above entitled atcion, that the plaintiff shall have until and including the 31st day of August, 1914, to prepare, serve and file a bill of exceptions in the above entitled cause.

WILL H. THOMPSON,
EDGAR S. HADLEY,
Attorneys for Plaintiff.

GEO. D. EMERY,
Attorney for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
No. 2527

ORDER.

It being shown to the Court that the parties to the above entitled cause, by their attorneys, have stipulated that the plaintiff may have until and including the 31st day of August, 1914, within which to prepare, serve and file a bill of exceptions in said cause; and it appearing to the court that it is right and proper that the time for so preparing, serving and filing said bill of exceptions should be extended until and including said 31st day of August, 1914:

It is hereby ordered by the Court that the time within which the plaintiff may prepare, serve and file his bill of exceptions shall be and it is hereby extended until and including said 31st day of August, 1914.

Done in open Court this 8th day of August, 1914.

EDWARD E. CUSHMAN, Judge.

Form O. K.: G. D. A.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
No. 2527

STIPULATION.

It is hereby stipulated by and between the attorneys for the plaintiff and the attorneys for the defendant in the above entitled action, that the plaintiff shall have until and including the 15th day of September, 1914, to prepare, serve and file a bill of exceptions in the above entitled cause.

EDGAR S. HADLEY,
WILL H. THOMPSON,
Attorneys for Plaintiff.

G. D. EMERY,
Attorney for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 31, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
No. 2527

ORDER.

It being shown to the court that the parties to the

above entitled cause, by their attorneys, have stipulated that the plaintiff may have until and including the 15th day of September, 1914, within which to prepare, serve and file a bill of exceptions in said cause; and it appearing to the court that it is right and proper that the time for so preparing, serving and filing said bill of exceptions should be extended until and including said 15th day of September, 1914:

It is hereby ordered by the Court that the time within which the plaintiff may prepare, serve and file his bill of exceptions shall be and it is hereby extended until and including the 15th day of September, 1914 .

Done in open Court this 31st day of August, 1914.

JEREMIAH NETERER, Judge.

O. K.: G. D. EMERY, Defts. Atty.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 31, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
F. P. KELLOGG,
Intervenor.
No. 2527

BE IT REMEMBERED, that heretofore and on, to-wit, Tuesday, July 21st, 1914, the above entitled cause came regularly on for trial in the above Court, and before The Honorable JEREMIAH NETERER, Judge of said Court sitting with a jury.

The plaintiff appearing by MESSRS. EDGAR S. HADLEY and WILL H. THOMPSON, his attorneys and counsel.

The defendant appearing by GEORGE D. EMERY, Esq., and A. W. SELOVER, its attorneys and counsel.

The intervenor appearing by J. Y. C. KELLOGG, Esq., his attorney and counsel.

AND, THEREUPON, the following proceedings were had and done, to-wit:

MR. KELLOGG: In the case, if your honor please, of Shields versus the Columbia River Lumber Company, the parties have stipulated that the complaint in intervention may be dismissed and I will present the order for your honor to sign.

THE COURT: The action on the part of Mr. Kellogg is dismissed.

Are the parties ready to proceed?

MR. EMERY: Defendant is ready.

THE COURT: Call a jury.

(A jury having been duly empaneled and sworn to try the cause, the following proceedings were had and done, to-wit:)

MR. HADLEY: Gentlemen of the Jury—We propose to show by the evidence to you in the trial of this case that back in 1910, and prior to that time, and during 1911, the defendant in this action, the Columbia River Lumber Company, was a Minnesota corporation, and whose stockholders, principally, if not all, were Minnesota men, owned in Chelan county a body of land. Some estimate it at some 38,000 acres of timber land, and some 11,000 acres of agricultural or fruit land. Mr. Charley Murray, of Tacoma, was agent in this state, it being a foreign corporation, they designated Mr. Murray as agent, and they desired to sell that property, so in 1910 Mr. Murray took the matter up with Mr. Winsor, and Mr. Winsor started in and attempted to sell that property. Mr. Winsor, in the course of his efforts, met F. P. Kellogg, and Mr. Kellogg became interested in the property with a view of purchasing it. It seems then there was no one in authority in the corporation to sell the property and they elected a selling committee who represented the stockholders and who represented the corporation. The matter progressed, and Mr. Winsor presented Mr. Kellogg to this selling committee, or some members of it, and Mr. Winsor had, prior to, or about that time, been authorized by the members of the selling

committee, as the agent for the corporation, to negotiate the sale of this property, and represent them as such. Mr. Kellogg then entered into apparently—

MR. EMERY—Pardon me. I wish to object to counsel's statements for this reason: The complaint in this action is for the conversion of certain stock, which, it is charged, was agreed to be delivered at a certain time to the Union Trust Company, and the defendant is charged with having wrongfully converted to its own use this stock. Now, the question as to whether Mr. Murray was the company's agent or whether Mr. Winsor was employed to sell the property, or whether he was entitled to any real estate commission, all matters outside of that agreement are wholly immaterial and counsel should not be permitted to state them; he should be confined to the written statement, and that alone, and the prior transactions leading up to it are all immaterial.

THE COURT: Objection overruled.

Note an exception.

MR. HADLEY: Rather, a tentative agreement or letter addressed by Mr. Kellogg to members of the selling committee was addressed on June 29th, 1911, and this transaction was entered into in a way. Later, on the 23rd day of August, a more full, and rather different in its terms, agreement was entered into by the Columbia River Lumber Company and F. P. Kellogg whereby they agreed to the organization of a corporation by Mr. Kellogg to take over this property and then to put a bond issue upon the property. At that time they entered into

a writing, and the Union Trust Company was designated as the Trust Company to hold the bonds and the stock, and agreed that this Company should hold for Thomas Winsor ten thousand shares for F. P. Kellogg, of the company which was to be organized. I think we will show then, gentlemen, that later, without having anything to do with Mr. Winsor or saying anything to him, they entered into a different agreement in the matter with Mr. Kellogg. However, the stock was kept by the Columbia River Lumber Company, and Mr. Kellogg went into the operation of the bond issue, and he continued in the operation of that property, and built mills and went ahead with the operation of it with the idea of carrying out the agreement. Later, Mr. Winsor desired to have his stock delivered to him, and the Company refused to do it, and then claimed that they owed him nothing for his services, and that brought about this action. They kept and held the stock and do to this day claim that he has no interest in it; and another matter we will show and which I want you to bear in mind, the sale of this property to Mr. Kellogg. The Columbia River Lumber Company only held their property at $205,000, and Mr. Kellogg took the property over at $225,000. $20,000 was to go to the persons who negotiated the sale of the property for the Company. Now, that left $10,000 for Mr. Winsor, $5,000 for Mr. Murray, and $5,000 for R. H. Steeves, which is shown by the agreement. A company was organized and stock was issued back to cover the $225,000, purchase price. They were paid in this transaction, $80,000 cash which came out of the bond

issue. There was left, $145,000 in preferred stock. There was the $80,000 and $145,000 which makes $225,000 the purchase price. $10,000 of that stock we claim, and it is fair to presume, and is a fact, was the stock of Thomas Winsor, $5,000 was the stock of Mr. Murray, and $5,000 the stock of Mr. Steeves. They are still holding the stock of that company, which refuses to surrender it, and claim they owe us nothing. I will say, Mr. Winsor, prior to the commencement of this action, transferred his claim in this stock to Mr. Shields.

MR. EMERY: I think we will reserve our statement, your honor.

THE COURT: All right. Call your witness.

MR. EMERY: If I understand counsel correctly, he does not wish to recover upon a quantum meruit but under the contract he recites. If I am not correct, I wish counsel to elect which he will stand upon and you should be required to elect whether you desire to recover on a contract of quantum meruit or whether you stand upon the recovery of damages for alleged conversion of the stock. Your complaint says one thing and your statement, as I understand it, is something else.

MR. HADLEY: The transaction grows out of this written agreement between the parties.

THE COURT: In looking at the amended complaint—

MR. EMERY: The original complaint was on a contract for commission. The amended complaint was for recovery of damages for conversion.

THE COURT: What do you say, Mr. Hadley, to Judge Emery's request?

MR. HADLEY: I say we are seeking to recover damages growing out of this contract, so recovery must come out of the dealings with this corporation and growing out of this contract and its dealings with F. P. Kellogg, and the F. P. Kellogg Lumber Company. We are, of course, suing for conversion of the stock, which, as we contend, was our stock and should have been delivered to us. The stock represents the compensation that has been earned, left in their hands, and this action is brought by reason of their refusal to surrender it.

THE COURT: Is there any estimate as to the value of this stock?

MR. EMERY: None whatever.

THE COURT—According to the contract, you are entitled to ten thousand shares.

MR. HADLEY: Which is of the par value of $10,000.

MR. EMERY: My point is, if they elect to stand upon a conversion of the stock, they cannot recover on a contract for commission. If they recover it will be because we have converted something which belongs to them to their damage.

MR. THOMPSON: Your honor, it is provided by the contract that Mr. Kellogg, or F. P. Kellogg Lumber Company, is to have a right to have that stock placed in escrow. That that stock was to remain there for a period of five years, in which Mr. Kellogg should pay for and take up that stock dollar for dollar, $10,000. Now, it is

alleged in the complaint, the defendant, Columbia River Lumber Company, made a deal in the absence of Mr. Winsor which prevented Mr. Kellogg, so far as Mr. Winsor is concerned, from paying for that stock, and kept it themselves.

THE COURT: Proceed:

CHARLES A. MURRAY, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

BY MR. HADLEY:

Q. State your name, please?

A. Charles A. Murray.

Q. You reside in Tacoma, Mr. Murray?

A. Yes, sir.

Q. Mr. Murray, what, if any, connection back in the years 1910 and 1911 did you have with the Columbia River Lumber Company?

A. I was the statutory agent of the Columbia River Lumber Company and did business for them in the state. I was authorized to sell the holdings of the Columbia River Lumber Company.

MR. EMERY—I think such authority as that should be in writing. I object to the witness' statement that he had that authority, unless he produces the writing.

Q. Mr. Murray, what was the nature of the authority that you had from the Columbia River Lumber Company?

A. I had a letter from Mr. Selover authorizing me—

MR. EMERY: I object to counsel's statement as

to the contents of the letter. He is a lawyer and knows better.

THE COURT: The letter speaks for itself.

A. I am unable to find that letter.

Q. Have you searched for it?

A. Yes, I have. I testified in a case last Spring in this connection and it may have been used there. I am unable to state.

Q. You do not know where it can be found?

A. It is not in its place in the file.

MR. EMERY: Let me cross examine a moment, your honor, before the contents of the letter is stated.

THE COURT: Proceed.

BY MR. HADLEY:

Q. Who was Mr. Selover that you mentioned?

A. He was one of the Columbia River Lumber Company.

Q. What position with the corporation did he hold or occupy?

A. I think Mr. Selover was secretary at that time.

Q. Secretary of the Columbia River Lumber Company?

A. Secretary of the Columbia River Lumber Company.

Q. Now, you stated, Mr. Murray, that you received from Mr. Selover a letter which had something to do with the sale—looking to the sale of this property, that you could not find?

A. Yes, sir.

Q. Will you state, if you can, the contents of that letter?

MR. EMERY: Now, may I cross-examine the witness a moment?

BY MR. EMERY:

Q. Mr. Murray, you say you could not find that in the file; you also said you testified concerning this matter in a case last Spring? Was the letter used in that case?

A. I am unable to state. The only thing that occurs to me to account for the absence of the letter from the files is that it may have been used then.

Q. And have you examined the file to see if it was there?

A. Yes, sir.

Q. The exhibits in that case?

A. No, sir; I did not.

Q. It may be there for aught you know?

A. Yes, sir.

Q. Where was that case tried?

A. In the Superior Court of this county.

Q. Have you endeavored to obtain a copy of the letter? Have you asked the Company for a copy of the letter?

A. I have not.

MR. EMERY: I object to the witness stating the contents of it. All sources of where the letter is have not been exhausted. If the paper could not be produced, we should have been called upon for a copy.

THE COURT: Objection overruled.

MR. EMERY: Note an exception.

THE COURT: I think during the recess the files of the Superior Court should be examined.

MR. HADLEY: I will do that.

MR. EMERY: I object to the question as being incompetent.

THE COURT: Objection overruled.

MR. EMERY: Note an exception.

A. You ask me to state the contents of the letter. I cannot undertake to do that any more particularly than to say that in some letter I was authorized to—

MR. EMERY: Now, that particular letter is the one referred to, and I object to counsel referring to some other letter.

THE COURT: Yes.

A. (Witness continuing)—the substance of the letter so far as the sale was concerned was that I was authorized to sell the land for $200,000 and receive a commission of five per cent.

BY MR. HADLEY:

Q. What lands were those, Mr. Murray?

A. They were the land—

MR. EMERY: This is important, and I think the witness should state the contents of the letter substantially as he recalls them.

THE COURT: Yes, confine yourself to the matters contained in the letter.

Q. State, Mr. Murray, as near as you can, what was contained in the letter about the land that would indicate what lands they were?

A. My recollection of the letter to which I referred that it was limited to a statement of the authority to sell, and the terms of sale on those lands about which we were having correspondence every few days. I had been representing the Company for years. They only had one body of land here and any reference to the land could only have reference to one particular body of land.

Q. What body of land was that?

MR. EMERY: That question is objected to, and I ask to strike out the answer of the witness as not responsive to the question. He has gone on and given his opinion of correspondence for years.

THE COURT: Objection overruled.

A. The land belonging to the Company in Chelan county, Washington.

Q. Do you know, Mr. Murray, about the extent of those lands?

A. There were approximately 50,000 acres.

Q. Did you ever see the land?

A. I have seen some of it.

Q. What was the character of it?

A. It was timber land, mostly.

Q. Do you have, in your possession, Mr. Murray, any correspondence between the Columbia River Lumber Company or any of its officers with regard to the sale of these lands?

A. I have some with Mr. Selover.

Q. Do you have them with you?

A. Yes, sir.

Q. I will ask you, Mr. Murray, to call attention to such communications you have there which refers to the disposition of these lands?

A. I have here copies of some letters I wrote to Mr. Selover, during the year 1911, and telegrams to me and telegrams from me, all bearing upon the subject of the sale of these lands.

Q. Those letters are letters from Mr. Selover and replies to Mr. Selover's letters fro myou?

A. Copies of my letters to Mr. Selover; some telegrams from him and a letter from him.

Q. What was the first letter or communication that you had?

MR. EMERY: Allow me to examine it?

MR. HADLEY: Yes.

MR. EMERY: I notice many of these letters are signed, "Tom," on the letterhead of Thomas Winsor. Those are not the letters you referred to?

THE WITNESS: I only referred to the letters I described between Mr. Selover and myself. I am not making any point about any letters from Mr. Winsor.

Q. Mr. Murray, you may state what, if anything you know, about the connection of Mr. Thomas Winsor with regard to the properties?

MR. EMERY: Well, I want to interpose the objection at this time that all of this testimony is immaterial under the amended complaint. They sue for damages on account of the conversion of the stock. If they establish that they must establish a contract to pay the commission.

THE COURT: Objection overruled.

A. I authorized Mr. Winsor to try to make a sale of the property.

MR. EMERY: If your honor please, I shall object to that statement, unless the authority is given in writing, specifying the property, and specifying the terms. I take it that they will show that was in writing, and, if in writing, that the writing be produced.

Q. Mr. Murray, what was the nature of the authority that you gave Mr. Winsor?

MR. EMERY: I object to that. The nature of it is revealed by the writing.

THE COURT: The objection is overruled. Proceed and see what was done. If there was a writing, we want to know it.

MR. EMERY: Does your honor recall the statute of frauds?

THE COURT: Oh, yes.

MR. EMERY: And your Supreme Court decisions?

THE COURT: Oh, yes. I might engage you to sell things for me, but before you can do anything, you must have it in writing from me.

(Whereupon the last preceding question was read to the witness by stenographer as follows:)

Q. Mr. Murray, what was the nature of the authority that you gave Mr. Winsor?

A. Whether oral or in writing, you mean?

Q. Yes.

A. I am sure it was oral.

Q. Now, state whether or not you base your authority for that upon the authority you had received and from the correspondence you had, some of which you had in your hand from Mr. Selover?

A. I did.

Q. Mr. Murray, I will ask you to refer to the letter which you have in your hand which refers to the matter of the sale of this property?

MR. EMERY: From Mr. Selover?

MR. HADLEY: Yes, from Mr. Selover.

A. You mean only about the sale that Mr. Winsor was connected with?

Q. I mean generally authorizing you to sell the property—to offer it for sale?

A. I have in my hand copy of a letter written by me to Mr. Selover on March 15th, 1911.

MR. EMERY: I think the copy then is the best evidence. We do not object to the copy being offered, but to the testimony of the witness.

THE COURT: Yes, the letter will speak for itself. The letter will be identified and then let it only speak for itself.

THE WITNESS: I was only proceeding to describe the letter.

THE COURT: Well, hand it to the clerk and have it identified. Give the date to the stenographer so he will get it in the record.

MR. HADLEY: If it is the same to you, Mr. Emery, we might fasten them all together.

THE WITNESS: It is the bottom one, Mr. Hadley.

MR. HADLEY: A letter to Mr. George H. Selover, dated March 15th, 1911.

MR. EMERY: They better be marked separately. We may want to refer to them.

THE COURT: Yes, take the figures.

MR. HADLEY: It is offered in evidence.

MR. EMERY: I shall object to it as being incompetent under the pleadings; not, however, that it is a copy.

THE COURT: Objection overruled.

MR. HADLEY: Telegram dated March 29th, 1911, addressed to Charles A. Murray, Tacoma, Washington, with the name George H. Selover on the bottom.

MR. EMERY: Same objection: incompetent and immaterial.

THE COURT: Same ruling.

Whereupon said telegram was marked plaintiff's exhibit No. 2 and admitted in evidence.

MR. HADLEY: Copy of a telegram from Charles A. Murray, Tacoma, Washington, to George H. Selover, at Minneapolis, Minnesota, dated March 31st, 1911.

MR. EMERY: Same objection.

THE COURT: Same ruling.

Whereupon said telegram was marked plaintiff's exhibit No. 3 and admitted in evidence.

MR. EMERY: Your honor, may I, without stopping to note an exception, may it be understood an exception is noted?

THE COURT: Oh, yes; an exception to each ruling of the court.

MR. HADLEY: Night letter of April 24, 1911, to George H. Selover, signed by Charles A. Murray.

MR. EMERY: Same objection.

THE COURT: Same ruling.

Whereupon said night letter was marked plaintiff's exhibit No. 4 and admitted in evidence.

MR. HADLEY: Day letter addressed from Minneapolis, April 25th, 1911, to Charles A. Murray, signed by George H. Selover.

MR. EMERY: Same objection.

THE COURT: Same ruling. Exception noted.

Whereupon said day letter was marked plaintiff's exhibit No. 5 and admitted in evidence.

MR. HADLEY: Copy of letter dated May 3rd, 1911, to George H. Selover.

MR. EMERY: Same objection. We do not object on the ground that it is a copy but that it is incompetent, irrelevant and immaterial.

THE COURT: Same ruling.

Whereupon said letter was marked plaintiff's exhibit No. 6 and admitted in evidence.

MR. HADLEY: Copy of a letter dated August 9th, 1911, to George H. Selover.

MR. EMERY: Same objection.

THE COURT: Let me see those letters. I do not know what they are.

(Counsel hands letters to Court.)

Whereupon said letter was marked plaintiff's exhibit No. 7 and admitted in evidence.

MR. HADLEY: Letter dated August 22nd, 1911, to George H. Selover, signed Charles A. Murray.

MR. EMERY: That is a carbon copy, isn't it, or is that a lead pencil copy?

MR. HADLEY: It looks like carbon.

MR. EMERY: Same objection to this letter as being incompetent and immaterial.

Whereupon said copy of letter was marked plaintiff's exhibit No. 8 and admitted in evidence.

MR. HADLEY: Night letter of August 28th, 1911, to George H. Selover.

MR. EMORY: Same objection.

Whereupon said night letter was marked plaintiff's exhibit No. 9 and admitted in evidence.

MR. HADLEY: Letter from George H. Selover, dated August 30th, 1911.

MR. EMERY: Same objection to this, that it is incompetent under the pleadings.

THE COURT: I understand all these objections go to the offers?

MR. EMERY: Yes, sir.

Whereupon said letter was marked plaintiff's exhibit No. 10 and admitted in evidence.

MR. HADLEY: It is understood that objection goes to all, and you need not make it each time.

September 4th, 1911, to George H. Selover, of Minneapolis, Minnesota, signed Charles A. Murray.

Whereupon said letter was marked plaintiff's exhibit No. 11 and admitted in evidence.

THE WITNESS: The original of that was signed by myself.

Q. Mr. Murray, are these all the letters and communications you have in regard to the transactions?

A. These are the only ones I could find bearing on the sale.

Q. And upon your authority as the agent?

A. Yes.

MR. HADLEY: I would like, if your honor please, to have those letters read.

THE COURT: Proceed.

MR. HADLEY: On account of the fact some of them are carbon copies, the witness can read them as well as I can, and perhaps better.

Read those letters so the jury can hear them. Take them in the order in which they are marked.

(Whereupon witness read copy of letter dated March 15th, 1911, and marked plaintiff's exhibit 1, as follows:)

"March 15th, 1911.

"Mr. George H. Selover, 923 Metropolitan Life Building,
Minneapolis, Minnesota:

"Dear Mr. Selover: On my return, after a few days' absence about the 5th, I learned that the people who were examining the timber land had not been able to go over a large part of it on account of the depth of snow still existing there. The following are extracts from a letter from my friend who is trying to make this sale. He is a retired lumberman and is very sanguine that he will

be able to make a sale soon. 'I have furnished them with maps and complete data, except as to the measurement of the timber, as to the quantity of timber I have given them my opinion and reasons upon which it is based. They say if they find it as I have represented, they will positively buy. However, inasmuch as there is a fair prospect of selling to the parties who have made a partial examination, and own timber adjoining that, that I sold to them in January, 1910, it is not wise to tie it up a day longer than is necessary. There is a nasty obstacle in the way of selling this proposition. It is this: No one has the knowledge to state positively all the facts concerning it. When I made the sale of 30,000,000 feet adjoining it, I made it on a statement of fact. It took but ten days to check them up and close the sale. The owner of this property had been trying to sell for two years; he had placed it with many agents; finally he came to me. He paid my expenses to go and look at it. After seeing it, we made the following bargain: I agreed to sell it within a year. In addition to my commission I got $500 for making a statement of facts concerning it. For this sum I cruised the timber and ascertained its scale, quality, average size and length, cost of logging, cost of logging railroad, the acreage of tillable and grazing land, etc., that an expert on lumbering propositions must set forth. It is worth $1,000 to make a like report on this proposition, a report that I could close a deal upon, subject to checking up the facts, taking as the basis of sale. If I had such a report now, with my reputation in the lumbering business, I could go to New York and close with the

parties in question. I would take a chance and make this report if the owners will give me a reasonable time to sell the property at the net price to them now asked. I do not think it will take me three months to make the report and close the deal, however, I want to be reasonably protected if I go to this expense.'

"Yours very truly."

(Whereupon witness reads day letter dated at Minneapolis, Minnesota, March 29th, 1911, and marked plaintiff's exhibit 2, as follows:)

"Minneapolis, Minnesota, March 29, 1911.

"Charles A. Murray, Tax Department, Northern Pacific Railway, Tacoma, Washington:

"Company will give ninety days provided complete examination and report is made by your man at his expense and we will provide one man to help complete duplicate is all. Data obtained to be delivered to us as made. Answer. GEORGE H. SELOVER."

(Whereupon witness reads night letter dated March 31st, 1911, and marked plaintiff's exhibit 3, as follows:)

"Tacoma, March 31, 1911.

"George H. Selover, Metropolitan Life Building, Minneapolis, Minn.:

"Winsor thinks can sell in ninety days but could not afford to risk so much on that contingency. He will undertake work if you will give us till January first next to make sale or pay him $1,000 if you sell before that time through other agency. Report to be delivered you January first without compensation if land not sold at any

time sooner on payment of $1,000. Prospective purchasers are examining land now.

"CHARLES A. MURRAY."

(Whereupon witness reads night letter dated at Tacoma, April 24th, 1911, and marked Plaintiff's Exhibit 4, as follows:)

"Tacoma, April 24th, 1911.

"George H. Selover, 836 Metropolitan Life Building, Minneapolis, Minnesota:

"May I give exclusive option for 15 days for preliminary examination with provision for additional 90 days to complete cruise to be participated in by our representative on payment of $25,000 to be forfeited if cruise shows 250,000,000 feet merchantable timber and sale not completed; if sale completed to apply on purchase price on terms given by you? CHARLES A. MURRAY."

(Whereupon witness reads day letter dated at Minneapolis, Minnesota, April 25th, 1911, and marked Plaintiff's Exhibit 5, as follows:)

"Minneapolis, Minn., April 25, 1911.

"Mr. Charles A. Murray, care Tax Department, N. P. Ry. Co., Tacoma, Wn.:

"Answering yours 24th. Terms stated are satisfactory. Go ahead; if the ninety days' option is required it should be signed by us and I think the money should be deposited here. GEORGE H. SELOVER."

(Whereupon witness reads copy of letter dated May 3rd, 1911, and marked Plaintiff's Exhibit 6, as follows):

"May 3, 1911.

"Mr. George H. Selover, 836 Metropolitan Life Building, Minneapolis, Minnesota:

"Dear Sir: I have a letter from Mr. Winsor written on the first inst., that he was leaving with two men sent by Lambert and Hoban, to decide preliminarily as to the land. If their report is favorable, they will be joined by Hoban who will be notified by wire so that he can deposit the $2500 and remain until the cruise is completed. I signed the preliminary agreement on April 25th, giving twenty days for the preliminary examination and making the second period to expire 85 days after the 15th of May. They wanted this arrangement because it would take them several days to get ready to go over. I made the money payable at the Pacific National Bank at Tacoma instead of there because I did not think that would make serious difference to you and they wanted that arrangement so that it would not be necessary to lose any time at all if they decided to put up the money.

"I enclose herewith the agreement to be signed in the second instance if they decide to make the cruise, for your signature. If, after this, they go ahead with the contract, I will prepare and forward for your execution, a contract in accordance with these provisions. The contract, which I enclose, can, when executed, be sent to the bank with authority to deliver to Lambert and Hoban on payment of $2500. I also enclose a copy for you to retain. If these people go ahead and make a purchase there will be $68,695 to come to you in cash and $121,305 will be payable in three equal annual payments with interest at six per cent in one, two and three years. The terms you gave me were $200,000, less a five per cent commission ,payable $40,000 down, the balance on time at six

per cent. This will give you upwards of $28,000 more of a cash payment than you require. The total acreage is 48,522, so that the total purchase price is $242,610.

"The other parties who are interested in the commission want to have it apportioned through my hands so if the main contract is made, I will want you to send a letter to the Pacific National Bank direct, or to them in my care, the same being confidential and separate from the contract correspondence, directing them that upon the payment of the sum of $121,305 on the purchase price, they may pay $52,610 to me or my order.

"You will notice, on checking, that there have been omitted from the contract the descriptions in sections 7 and 19, township 24-21 and section 25-24-20. There is not anything like the acreage in these descriptions given in the old list, on account of error in the survey. There is none of section 19-24-21 and very little, if any, of section 25-24-20. However, what there is of these descriptions I wish to have you convey to me if this sale goes through.

"We have several other parties on the string if we fall down on this deal. The difficulty in selling this land is, as you know, on account of the quality of the timber rather than the quantity. Mr. Winsor, who is an old mill man, and has sold a lot of timber land on that side of the mountains, has developed a very excellent story which is impressive, about what can be done with this timber to realize on it, beyond what one, not familiar with conditions would expect, and he has a lot of different parties that are taking a real interest in the subject.

"You asked me in a recent note who Hoban is. He is a Portland timber man and that is all I know about him. Lambert is a banker. Winsor feels very confident that if the matter goes beyond the payment of the $2500 that the sale will go through. Very truly yours."

MR. EMERY: I understand that counsel does not pretend that agreement was ever carried out, so what is the use of burdening the record with it?

THE COURT: What is the purpose of it?

MR. THOMPSON: It is a history of it. In the first place, Mr. Winsor came into it.

THE COURT: Does this lead up to the contract?

MR. EMERY: Not even the same parties.

MR. THOMPSON: Mr. Winsor was taken into it for the purpose of making a report on that timber. He proceeded to do that and then they did not sell to those particular parties. Then he used that scale, the scale made, in the next deal with Mr. Kellogg, and he was taken into that in the same way, but part of it was worked out during the first engagement.

THE COURT: What is the use of taking up the time of the Court with this ancient history? I understood it was directed to the contract.

MR. THOMPSON: I think if the court was as familiar with it as we are, your honor would see that Winsor's employment was step by step.

THE WITNESS: The next letter refers to the Kellogg transaction.

THE COURT: Let us see what it is.

(Whereupon witness reads copy of letter dated on August 9th, 1911, and marked plaintiff's exhibit 7, as follows:)

"August 9, 1911.

"Mr. George H. Selover, Metropolitan Life Building, Minneapolis, Minnesota:

"Dear Mr. Selover: Mr. F. P. Kellogg's attorney has sent to me a new form of agreement and escrow agreement, prepared pursuant to my disapproval of the original arrangement, which forms are satisfactory as far as they go, but in my judgment, even if the proposed arrangement should be made, omit provisions which should by all means be included. As he states, this is the very best that Mr. Kellogg will do, it does not seem worth while to discuss other necessary provisions. Mr. Kellogg makes much of placing his whole responsibility behind his contract but a large responsibility can be easily wiped out in this kind of an enterprise. My own views are if I were the party interested and were tempted to make such an arrangement I would only count that I was making the sale for $80,000. I would count the prospect of getting more than that only a remote possibility.

"I am leaving this morning for about a week and am writing Mr. Collyer to let me know by the time of my return just how much assurance of providing a purchaser he can give. By that time I will have had time to hear from you again as to whether you decide to go through with this arrangement. Mr. Kellogg's attorney has asked me to return the papers which he sent to me

so I presume he is sending the originals direct to Minneapolis. Very truly yours."

MR. EMERY: I think that is open to the same criticism; nothing signed by the Company and nothing to bind anybody.

(Whereupon witness reads copy of letter dated August 22nd, 1911, and marked Plaintiff's Exhibit 8, as follows:)

"Aug. 22—11.

"Dear Mr. Selover:

"I find a note stating that Kellogg will furnish a surety bond for the deferred payments and wanting me to write you my views of that arrangement. It is almost needless to say that a good bond would satisfy all my objections. In such case I would regard it as a good sale. Truly, CHARLES A. MURRAY."

(Whereupon witness reads copy of night letter dated at Tacoma, Washington, August 28th, 1911, and marked Plaintiffs Exhibit 9, as follows:

"Tacoma, Wash., Aug. 28, 1911.

"George H. Selover, 926 Metropolitan Life Ins. Bldg., Minneapolis, Minn.:

"In making contract please arrange that in any event you receive copy of whatever cruise shall be made in connection with these negotiations. I have another party ready to take this up on more desirable deal if this shall fail and a reliable cruise will greatly facilitate closing that deal. CHARLES A. MURRAY."

(Whereupon witness reads letter dated August 30th, 1911, and marked Plaintiffs Exhibit 10, as follows:)

"Minneapolis, Minn., August 30th, 1911.

"Mr. Charles A. Murray, Tax Dep't, Northern Pacific Railway Co., Tacoma, Wash.:

"My Dear Sir: Your telegram of the 28th was received the 29th, and I at once telegraphed Mr. Aldrich to consult you respecting the final form of the papers and to include, if possible, that we receive a copy of the cruise report whether the other people buy or not. The contracts were sent to him several days ago, and you have before this, doubtless, received word from him.

"Yours truly,

"GEO. H. SELOVER."

(Whereupon witness reads letter dated September 4th, 1911, and marked Plaintiff's Exhibit No. 11, as follows:)

"Sept. 4—11.

"Mr. Geo. H. Selover, Minneapolis, Minn.:

"Dear Mr. Selover: It being labor day, I am obliged to address you by hand.

"I enclose draft of revised contract signed by Kellogg which I approve.

"Three things I arranged to have inserted are, provision that Kellogg's deed to corporation shall be filed for record by Trust Company as soon as your deed is delivered. This to give value to stock;

"Provision for copy of cruise;

"Provision that by-law shall protect stock pledge against transfers.

"I truly hope you will receive your $80,000 promptly.

"Very truly, CHARLES A. MURRAY."

Q. (By MR. HADLEY.) Mr. Murray, those last letters you just read, those are letters written at the time the negotiations were on with Mr. Kellogg?

A. Yes, sir.

Q. And refers to Mr. Kellogg's negotiations?

A. Yes, sir.

THE COURT: The noon hour has arrived.

MR .HADLEY: One more question and I will be through.

THE COURT: All right.

Q. What Kellogg do you refer to?

A. Mr. F. P. Kellogg.

(Whereupon the jury was admonished by the court, and an adjournment taken until two o'clock p. m.)

TUESDAY, JULY 21, 1914, 2 *P. M. SESSION.*

THE COURT: Do both sides concede the jury is present?

MR. EMERY: Yes, sir; we do.

THE COURT: Very well. Proceed.

CHARLES A. MURRAY (on the stand).

Cross-Examination.

By MR. EMERY:

Q. You practice law in Tacoma, Mr. Murray?

A. I am not in active practice now.

Q. At the time this transaction was taking place, were you in active practice?

A. Not in general practice, no.

Q. What were you doing?

A. Connected with the Northern Pacific.

Q. In what capacity?

A. Assistant tax commissioner.

Q. And had you been looking after the taxes for these people upon this property?

A. In connection with the business I did for them, I looked after the taxes sometimes. I do not recall now having had to do that.

Q. You said you were the statutory agent for the Columbia River Lumber Company?

A. Yes, sir.

Q. You mean by that you had the ordinary statutory appointment as an agent to accept service?

A. Yes, sir.

Q. That appointment did not give you any authority to sell land or anything of that kind?

A. No, sir.

Q. You say this letter you received from Mr. Selover told you they wanted to sell the land in question; would sell it for $200,000 and pay a five per cent commission; is that correct,—is that the substance of this letter?

A. Yes. I had been doing business with that Company right along for years; and in fact they wanted to sell that land and had been trying to sell it for years, and had talked with Mr. Selover about it time and time again, and we are still wiring.

Q. Had you asked them to sell at a fixed price or to put a price upon it?

A. I wrote Mr. Selover for the price I might sell it and the commission.

Q. In this letter it told you to sell it for $200,000 and five per cent commission to you if you sold it?

A. Yes, sir.

Q. Did it mention any terms of sale?

A. Terms were mentioned.

Q. Did that letter mention any terms of sale?

A. I cannot state.

Q. Did that letter contain any legal description of the land by which any stranger could identify it?

A. I doubt it. Any letter that passed between us would refer to only one body of land.

Q. True, but did that letter contain any legal description by which any stranger could identify it?

A. Yes, we had some correspondence.

Q. Have you any letters here that refer to any quarter or sections of land?

A. No, there are dozens without the descriptions.

Q. You understood it referred to the particular land in controversy, but there was no statement as to what particular land it was that he had?

A. Well, the land was described in a general way.

Q. Now, I will have to go back and ask you if his Honor, Judge Neterer, could find it without further knowledge than the letter contains?

A. No, sir.

(Witness excused.)

THOMAS WINSOR, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By MR. HADLEY:

Q. Mr. Winsor, when did you first understand, and how, that the Columbia River Lumber Company owned lands in Chelan County, Washington.

MR. EMERY: I object to that as being immaterial and incompetent. We do not care what the understanding was or how he understood it.

THE COURT: Oh, he may answer it.

A. 1909.

MR. EMERY: It is going back into ancient history is all, your Honor.

Q. Through whom did you learn or gain that information ?

MR. EMERY: That is objected to also as being immaterial.

THE COURT: Let him answer.

A. Mr. Boone of Antioch claimed to have the selling of the land and I took up an examination of the land then personally.

THE COURT: The question is answered.

Q. When, if at all, did you first speak to Mr. Murray about it?

A. I think in August, 1910.

Q. You may state, Mr. Winsor, what the nature of any conversation was you had with him about the sale of these lands.

MR. EMERY: I object to it, your Honor, as being incompetent and immaterial, and wholly improper. In the first place the law requires that a contract with an agent to sell land shall contain a correct description of the land, and must provide the terms of sale. Your Honor has held they must prove this contract. The conversations with Mr. Murray do not prove anything and do not furnish the basis of negotiations.

THE COURT: Objection sustained.

Q. Mr. Winsor, state what you did, if anything, in regard to finding a purchaser for this specific property?

MR. EMERY: That is objected to, until authority to find a purchaser is shown. These people cannot prove a real estate contract to pay a commission in this way. If they had no authority to find one, your Honor, it would not entitle them to sue for a commission.

MR. THOMPSON: Your Honor, the plaintiff is not suing upon a contract for the furnishing of a purchaser, either in writing or not in writing. If one succeeds in obtaining a purchaser for another and the other accepts that service and ratifies the act of the agent, then the contract of ratification is binding, whether he could have sued upon the original contract and recovered or not. What we propose to show is that Mr. Winsor furnished the purchaser and they accepted the purchaser ,and we expect to show by their qualified authority they made a written agreement with Mr. Winsor to carry out what he did and he proceeded to carry it out and then they set aside the stock which they were to give him.

(Argument continued.)

We have got to show that he earned that stock in the first place and they accepted his work and agreed to pay for this work after he done the work. This is simply a step to show what he did; that he put in a substantial compliance with the agreement with them, although it hadn't at that time reached the stage of writing, except through the letters to Mr. Murray. At the proper time we expect to put in the contract.

MR. EMERY: We contend then if the contract was not in writing to pay the commission no matter what the agent did, he could not recover. The contract to pay the commission must be in writing or it is void.

MR. THOMSON: We are not suing on a contract of *quantum meruit.*

THE COURT: As stated by me a moment ago, you set out a basis,—you allege a contract was entered into between the plaintiff and defendant, and that is the basis usually alleged in the contract and the step which leads up to the rights of recovery. Why not start there and find out where we are in relation to this, and then if it becomes necessary we can reach out and get other information. In the absence of that, I do not know whether this ought to be admitted or not. In connection with the issues as tendered, it might be immaterial.

(Argument continued by Mr. Hadley.)

THE COURT: Well, why don't you prove the contract or writing.

Q. (By MR. HADLEY.) Mr. Winsor, I want to call your attention to what purports to be a letter dated——

A. July 3rd, 1911.

Q. Yes. Did you receive that letter?

A. Yes, sir.

Q. Who did you receive it from?

A. Mr. C. R. Aldrich, chairman of the Sales Committee of the Columbia River Lumber Company.

Q. When did you receive it?

A. I received it August 3rd, 1911.

THE COURT: Let it be marked as an exhibit.

MR. EMERY: Your Honor, we object to that paper because it is incompetent and immaterial. It does not contain any description of the contract. It does not specify any authority which this agent has to sell any land which it represents. It is not a contract to sell this particular land nor to pay a commission. They are not suing on that contract at all.

THE COURT: Objection overruled.

MR. EMERY: Note an exception. I want to read half a dozen lines from one of the State Court decisions on which I am making these objections. I am reading fro mthe 75th Washington in the case of *Cushman versus Evans.*

(Counsel reads from case cited and continues argument.)

THE COURT: I will receive the evidence at this time to see what it will develop.

MR. HADLEY: I will read this letter, Plaintiff's Exhibit No. 12

"Seattle, Washington, July 3, 1911.

"To Whom It May Concern:

"Mr. Thomas Winsor, of Seattle, is authorized to handle our timber and land in Chelan County, and is the only person holding such authority.

"Mr. Winsor is a thoroughly capable and able business man for this purpose and has been engaged in the timber and lumber business, directly and indirectly, in its various branches in the State of Washington during the past twenty-four years, and for about a dozen years prior to that time was engaged in the timber, lumber and salt industries in Michigan.

"We have given Mr. Winsor the exclusive privilege above referred to because we feel that he is well quailfied to look after our interests. Respectfully,

"THE COLUMBIA RIVER LUMBER COMPANY,

"Per C. R. Aldrich,

"Chairman Sales Committee."

Q. After you received that, Mr. Winsor, what did you proceed to do?

A. I proceeded to examine the property, closing up the deal with F. P. Kellogg Lumber Company, so as to make an intelligent report of my work; of the amount of timber, and then aid the Company in closing up the deal with the F. P. Kellogg Lumber Company.

Q. Mr. Winsor, then what were the next step or dealings that you had with the Columbia River Lumber Company?

A. Why, in the closing up of that deal, there was an escrow agreement made, providing for my commissions

and for my services in making an examination of the land.

Q. Now, I will call your attention to that instrument and ask you if that is what you refer to?

A. Yes, sir; this is the escrow agreement.

MR. HADLEY: I will offer this.

MR. EMERY: Is that the same one of which a copy is attached to the complaint?

MR. HADLEY: Yes.

MR. EMERY: We object to it on the ground that it does not come within the statute of frauds and is incompetent, irrelevant and immaterial.

MR. HADLEY: I read from Plaintiffs Exhibit No. 13:

"Seattle, Washington, August 23rd, 1911.

"Union Trust Company, Chicago, Illinois:

"Gentlemen:

"The undersigned Columbia River Lumber Company, a corporation, F. P. Kellogg, Thomas Winsor, and R. H. Steeves have agreed, as is below stated, and direct you to make certain payments and disposition, as is embodied in this instrument, upon behalf of all the parties concerned.

"Reference is hereby made to an agreement dated August 23rd, 1911, between the Columbia River Lumber Company and F. P. Kellogg wherein the Columbia River Lumber Compan yhave, upon the terms in said agreement mentioned, agreed to sell to F. P. Kellogg certain properties located in Chelan County, Washington, for the agreed price of $225,000; also a certain escrow agreement dated August 23rd, 1911, directed to you as the

escrow agent providing for the payment by Kellogg, or his assigns, a corporation to be organized, as is provided in the agreement above mentioned, to you as escrow agent for the benefit of the Columbia River Lumber Company $225,000, the purchase price of said properties. Reference is made to the above two agreements the same as if the terms of said agreement were here set out in full.

"Now, therefore, in consideration of the services rendered by Thomas Winsor and R. H. Steeves in negotiating and effecting a sale of said propertty, the Columbia River Lumber Company have agreed in event of said Kellogg's carrying out completely the said proposed sale, to pay as a commission for perfecting said sale the sum of $15,000, in manner and form following. Now, you are hereby requested and directed that when the certificates of stock mentioned in said agreements are delivered to you by F. P. Kellogg, or his assigns for the benefit of the Columbia River Lumber Company ,to set over and hold for the benefit of Thomas Winsor $10,000 worth of said certificates, and for the benefit of R. H. Steeves $5,000 worth of said certificates, and when the cash shall be paid to redeem said certificates and the interest thereon, you are hereby further directed to pay to Thomas Winsor, of Seattle, Washington, the sum of $10,000 plus the interest at 6 per cent. accrued thereon, and further, to pay to R. H. Steeves $5,000, together with the interest accrued thereon at 6 per cent., said amounts to cover all the claim or claims of the said Thomas Winsor and R. H. Steeves against any of the parties to said transaction on account of commissions for the negotiating and completing of

sale of said property, the same to be deducted as hereinabove stated from the amounts to be turned over by you to the Columbia River Lumber Company, and the amount of the escrow agreement entered into between F. P. Kellogg and the Columbia River Lumber Company is varied to the amount of $15,000.

"COLUMBIA RIVER LUMBER COMPANY,

"By GEORGE H. SELOVER,

(Seal.) "Its President.

"By GEO. B. DARLING,

"Its Secretary.

"F. P. KELLOGG,

"THOMAS WINSOR.

"R. H. STEEVES."

MR. HADLEY: Do you object to the admission of this?

MR. EMERY: Yes; that is not set out in that complaint nor does it describe the property.

MR. HADLEY: It is the one just referred to in the contract I read.

Q. Do you know whether or not that is the agreement referred to in the agreement I have just read?

A. Yes, sir.

MR. HADLEY: I offer this instrumnet in evidence.

Q. That is, the agreement I just read, is the agreement with F. P. Kellogg?

A. Yes, sir.

MR. EMERY: We enter the objection to this exhibit, that it is not competent under the rulings of the Supreme Court. I think the contract should set forth

all the essentials of a complete contract. This gentlemen says that is the contract referred to. We have his word for it. We have a half dozen contracts dated August 23rd, and they are not alike. In short, it is having recourse to parol testimony to complete the commission contract. That is what the Supreme Court says cannot be regarded.

THE COURT: This may be received at this time.

MR. EMERY: Note an exception.

MR. HADLEY: Now, I read from Plaintiff's Exhibit No. 14.

"Minneapolis, Minn., Aug. 23, 1911.

"F. P. Kellogg, Esq., Seattle, Washington:

"Dear Sir: For one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, we hereby grant to you the option to purchase from us at any time during a period of four months from the date hereof, our entire property located in Chelan County, Washington, the particular description of which is attached hereto and made a part hereof, upon terms and conditions as follows, to-wit:

"The purchase price of said property shall be $225,000, to be paid as follows: $80,000 upon delivery of deed; $145,000 on or before five years from date of delivery of deed, $140,000 thereof to be paid to Columbia River Lumber Company, and $5,000 thereof to be paid to Charles A. Murray, of Tacoma, Washington, the unpaid purchase price to bear interest at the rate of 6% per annum, payable on or before the expiration of the five-year period.

"We will at once execute in your favor, a good and sufficient warranty deed, in fee simple, to said property

free and clear of all encumbrances, subject to survey errors and rights acquired by adverse possession (and reservations, etc., hereinafter set forth), and deliver same to the Union Trust Company in Chicago, Illinois, to be held by said company in escrow for delivery to you, in accordance with the agreement attached hereto and made a part hereof. We will furnish you with a complete abstract of said property for purpose of examination, as soon as the same can be secured after demand by you.

"You are to furnish and deliver to us when deed is delivered a surety bond satisfactory to us, issued by a surety company empowered to do business in the State of Washington, guaranteeing the faithful performance of the contract and payment of the balance to become due us. The payment of premium and renewal premiums for said surety bond not to exceed the total sum of $6,000, shall be allowed and paid from installments due or to become due upon the purchase price, and said amount of premiums paid shall be deducted from current payments on purchase price upon presentation of receipt for premium payments. You are to further secure said payments by placing in escrow as herein provided, the entire capital stock of a corporation organized by you for the purpose of taking over and developing said property, the entire stock of said corporation to be $225,000. The by-laws of the corporation shall provide that no transfer of the stock nor any interest therein shall in any manner affect or qualify the rights of the parties for whom the stock is held in trust nor the rights of the trustee in the execution of its trust.

"Said conditions are:

"1. You are to deliver to the said Union Trust Company of Chicago, upon receipt from it of said deed above mentioned, a deed to the corporation organized by you for the purpose of developing said property by erecting plant and facilities to manufacture and market lumber, which deed shall then forthwith be filed for record in Chelan County, Washington, by said Union Trust Company of Chicago.

"The name of the corporation shall be _____ _____ and be duly organized under the laws of the State of Washington.

"1 1-2. You are forthwith upon delivery of this option to you to have the timber on all of the lands hereinafter described carefully cruised, complete data of which cruise shall be made in writing, and certified by the cruisers making same, one copy of which cruise so certified shall be delivered to us.

"2. You are to agree that said corporation will issue and dispose of its bonds for a sum not less than $180,000 and not more than $225,000, the said bonds to become due at the expiration of or before ten years from date, and to bear interest at the rate of 6% per annum, and that the money received from the sale of said bonds, exclusive of the sum of $80,000 to be paid to us, shall be used solely by said corporation for the building of a mill, the conduct of the business and payment of expenses incidental to the negotiation of said bonds.

"3. You are to agree that said corporation will set aside a fund of $2 per thousand for every thousand feet of

timber manufactured and marketed from said property by it, which sum shall be used solely for the purpose of retiring the bonds above referred to, and a further minimum sum of $2 per thousand for every thousand feet of timber manufactured and marketed from said property shall be used solely for the purpose of payment of the unpaid purchase price.

"4. You are to agree further that all of the net profits derived from the business, including the proceeds from the sale of the logged-off land, untimbered land, and timbered land, exclusive of timber, shall be applied solely to the payment of the unpaid purchase price, except such sums thereof as may be needed for the purpose of making payments to bondholders, it being understood that above excepted proceeds from the sale of logged-off land, untimbered land and timbered land, exclusive of timber, shall be applied to the payment of the principal of bonds only.

"5. You are to agree to act as manager of said corporation, after the sale of said bond issue has been consummated, for a salary of $3,000 for the first year, increasing $1,000 per year thereafter until the sum of $5,000 is reached, but at no time are you to receive a salary in excess of $5,000 per year; and you are to agree that no other officer of the corporation shall draw any salary whatsoever.

"6. You are to agree that the books of the corporation shall be open to the inspection of our officers or any of them at any and all times upon reasonable notice.

"Respectfully submitted,

"COLUMBIA RIVER LUMBER COMPANY.

"(Seal.) "By GEORGE H. SELOVER,
"President.

"By GEORGE B. DARLING,
"Secretary.

"F. P. KELLOGG."

"State of Minnesota, County of Hennepin, ss.

"On the 7th day of Sept., 1911, before me personally came George H. Selover and George B. Darling, to me known to be the president and secretary, respectively, of the corporation that executed the within and aforesaid instrument ,and acknowledged the same to be the free and voluntary act and deed of said corporation for the uses and purposes herein mentioned, and on oath stated that they were duly and regularly authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

"IN WITNESS WHEROF I have hereunto set my hand and affixed my official seal on the day and year above written.

"(Seal.)

"ARTHUR H. SELOVER,

"Notary Public in and for the State of Minnesota, residing at Minneapolis."

MR. HADLEY: Following then is a description of the property which, on account of the time it will take, I will not go over. It described the property in Chelan county, Washington, minutely.

(Counsel continues reading from plaintiff's exhibit 14 as follows:)

"Union Trust Company, Chicago, Illinois.

"Gentlemen:

"The undersigned, Columbia River Lumber Company, a corporation, and F. P. Kellogg, of Seattle, Washington, hand you herewith a deed to timber property in Chelan

county, Washington, and instruct you concerning the same as follows:

"You are to deliver said deed to said F. P. Kellogg at any time with four months from the 23rd day of August, 1911, that said Kellogg tenders you.

"1. $80,000 in cash or certified check.

"2. $225,000 in certificates of stock (par value) in the corporation organized to take over and develop the timber property conveyed in the deed, as security for the payment of $145,000, with interest at 6% per annum, principal and interest payable on or before five years from the date of delivery of deed.

"3. The affidavit of said Kellogg that the capital stock of said corporation is limited to $225,000 and that the corporation is the one which will take over and develop the property.

"4. Said Kellogg's surety bond in favor of the Columbia River Lumber Company, and Charles A. Murray, guaranteeing the payment of $145,000 on or before five years from the date of delivery of deed, with interest at 6% per annum, interest payable on or before the expiration of the five year period.

"Should you receive said $80,000, you are to ascertain from an abstract, considered by yourselves reliable, if there are any valid encumbrances against said property, and, if so, you are to retain a sufficient sum out of said $80,000 and satisfy the same, paying the balance to said Columbia River Lumber Company. Should there be no encumbrances you are to deliver the full amount to said Columbia River Lumber Company. In either event you

are to deliver to the Columbia River Lumber Company the surety bond and to hold the certificates of stock as additional security for the payment of the $145,000 and interest above referred to, it being understood that the ownership of said stock shall remain in the parties to whom originally issued, or their assigns, until default.

"Should said sums be paid on or before maturity, you are to pay over, together with proportionate interest, $140,000 to Columbia River Lumber Company and $5,000 to said Murray and return the said certificates of stock to the said Kellogg. At any time during the five year period you are to accept any and all sums tendered to apply upon said indebtedness and apply in liquidation pro rata as the interests of the above creditors appear. Should said Kellogg make no sufficient tender within the four months, you are to return said deed to Columbia River Lumber Company.

"COLUMBIA RIVER LUMBER COMPANY.

"(Seal.)

"By GEORGE H. SELOVER,
"President.

"By GEORGE B. DARLING,
"Secretary.

"F. P. KELLOGG."

Q. Mr. Winsor, did you make a cruise or any report upon the timber lands referred to and described in that contract?

A. I did.

MR. EMERY: I object to that as being irrelevant and immaterial and move to strike out the answer of the witness.

THE COURT: It may stand.

Q. State, Mr. Winsor, what your cruise and report consisted of?

MR. EMERY: Same objection.

THE COURT: What is the purpose, Mr. Hadley, of this testimony?

MR. HADLEY: We want to show that Mr. Winsor performed the services as provided here; that Mr. Kellogg, in that ocntract, was to have a cruise made of that property.

THE COURT: Proceed.

Q. I will call your attention, Mr. Winsor, to that paper, and state, if you can, what it is?

A. That is my report on that tract of timber belonging to the Columbia River Lumber Company.

Q. Is that the tract of timber described in the contract I have just read?

A. Yes, sir.

Q. Same property?

A. Same property.

Q. What did you do with this report?

A. I delivered it to F. P. Kellogg and the Columbia River Lumber Company. I delivered a copy each to F. P. Kellogg and the Columbia River Lumber Company.

Q. And this is the copy that you retained, a duplicate copy?

A. Yes, sir.

Q. Is that your signature on the bottom of it?

A. That is my signature, yes, sir.

MR. HADLEY: I will offer it.

MR. EMERY: I do not think this is material, and I object to it for that reason.

THE COURT: Admitted. Proceed.

Whereupon said instrument was marked plaintiff's exhibit 15 and admitted in evidence, which said instrument is, in words and figures, as follows, to-wit:

"Seattle, Wash., October 9, 1911.

"F. P. Kellogg Lumber Company.

"Gentlemen:

"I herewith submit the report, as per your request, on the following timbered and other lands in Chelan county, Washington.

TIMBERED LANDS—	Acres	Stumpage (ft.)
"*Township* 23, *Range* 19.		
"Lots one and two of section three	80.73	None
"20 acres off of the east end of lot one can be irrigated, it is good fruit land. A high ditch could supply this entire lot; the highest point is 1500 ft. elevation, the lowest 900. Lot 2 is from 1500 to 1800 feet elevation and would be worth about $10 per acre.		
"*Township* 24, *Range* 19.		
"All of fractional section 7.----	645.28	
"This is timbered and there is water and nearly 20 acres of orchard land in the S. E. corner of this section. There is also water		

TIMBERED LANDS—	Acres	Stumpage (ft.)
on the W. half of this Sec., on both sides of the quarter line; here also are favorable conditions for growing winter apples. On this Sec. there is about 100 acres of wheat land, the balance is best adapted for grazing. I estimate this will cut ----------		5,700,000
"*Township* 24, *Range* 19.		
"All of section 17 ----------	640.00	
"The east half of this section is very good farming land. There is water on the S. E. quarter; a small orchard of 5 to 8 acres would be profitable along the course thereof. The west half of this section is suitable for grazing and is timbered. I estimate this will cut		3,500,000
Towship 24, *Range* 19.		
"All of section 19 ----------	644.22	
"This is very well provided with water; it is favorable for fruit and all around farming, grazing, etc. I believe it will cruise------		6,000,000
Towship 24, *Range* 19.		
"All of section 29 ----------	640.00	
"This section is 5-6 grazing land, the balance is fruit and general farming land. Water runs through		

TIMBERED LANDS—	Acres	Stumpage (ft.)
a narrow coulee from the N. easterly to the S. westerly corners of the section. I estimate this section will cut ----------		6,000,000
Towship 24, *Range* 19.		
"North half section 33 --------	320.00	
"The S. E. 40 acres of this tract takes in the Nehockum Valley. This land will make a good fruit proposition; it is good property. The balance of this half section is timbered and 80 acres of it is low enough to be irrigated. I estimate this will cruise ----------		2,000,000
"*Township* 26, *Range* 19.		
"Lots 1 and 2, ½ of N. E. ¼, S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼ and E. ½ of S. E. ¼ of section 1 ----------	359.34	
"The Entiat River runs through a part of this land. The banks, however, are high, and but a small part of it can be irrigated—I think about 10 acres. The slopes of the banks are exclusively grazing land. That upon the benches about 80 acres can be used for other crops. This land will, I estimate, cut----		750,000
"All of fractional section 3 ----	634.80	

TIMBERED LANDS—	Acres	Stumpage (ft.)
"This section is largely grazing land; there is water on it in three places running easterly; some of it runs the entire width of the section. Hogs, cattle and sheep, also poultry can be profitably raised on this section. Small orchard and garden tracts extend along the course of the river for a mile. This is a very valuable section. I estimate it will cut		6,000,000
"All of section 5	634.64	
"This section is suitable for a stock ranch. It has water its entire width from the west center to the east center. It will supply everything needed for the feeding of its owner and his stock. It is not so valuable, however, as section 3. This, I estimate, will cut		6,000,000
"All of section 7	644.79	
"This section is all grazing land, a branch of Mad Creek runs through it. I estimate this will cut		4,000,000
"All of section 9	640.00	
"This section is grazing land and is supplied with water from a branch of Mad Creek. I estimate it will cut		5,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of section 15 ----------	640.00	
"This section is a duplicate of section 9 in every way and will cut about ----------		6,000,000
"All of section 17 ----------	640.00	
"This section is likewise a grazing stock ranch section. I estimate it will cut ----------		6,000,000
"All of section 21 ----------	640.00	
"This section is about the same as 17, not quite as good. It will cut about ----------		5,000,000
"All of section 27 ----------	640.00	
"This is fine stock ranch property combined with fruit and general farming. It's well supplied with water. I estimate it will cut		8,000,000
"All of section 31 ----------	646.79	
"This is exclusively a grazing section, a branch of Mad Creek runs into it; the east half is quite level, the west very step. I estimate it will cut----------		6,000,000
"All of section 33 ----------	640.00	
"This section will make a good stock ranch combined with fruit and general farming. A branch of Mad Creek runs from near the S. W. corner to the N. E. corner. I estimate this will cut ----------		6,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"*Township* 27, *Range* 19.		
"S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ of section 5 ----------	120.00	
"This is of no value except for grazing. Two branches of Mad Creek run through it. I estimate it will cut ----------		1,500,000
"All of fractional section 7----	645.20	
"This is well adapted for a stock ranch; branches of Mad Creek run through every quarter section of it; is also very level. I estimate it will cut ----------		7,000,000
"All but the N. ½ of N. ½ of section 9 ----------	480.00	
"This is exclusively grazing land; branches of the Entiat River run well into it. I estimate it will cut ----------		5,000,000
"The S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼, section 11 -------	120.00	
"This is a very good piece of land and part of it can be irrigated. I estimate it will cut ----------		1,000,000
The S. ½ of N. ½ and S. of section 13 ----------	480.00	
"This is a fine property, as a branch of Stormy Creek runs into		

TIMBERED LANDS—	Acres	Stumpage (ft.)
it. It can be used for fruit and farming. I estimate this will cut		6,000,000
The N ½ of N. E. ¼, S. W. ¼ of the N. E. ¼ of S. E. ¼, and W. ½ of section 15	480.00	
"This property is well watered; the Entiat River runs through the N. E. ¼. It will make a good fruit and stock ranch. Considerable of it can be irrigated. I estimate this will cut		3,000,000
"All of section 17	640.00	
"This will make a good farming, fruit and stock ranch; two branches of Mad Creek and one of the Entiat run through it. I estimate it will cut		9,000,000
"All of fractional section 19	645.29	
"Mad Creek runs through the S. W. ¼ of this section. It is suitable for a stock ranch. I estimate this will cut		6,000,000
"All of section 21	640.00	
"This is a fine section; Mad Creek runs from N. to S. through the center of it. I estimate it will cut		7,000,000
"All of section 23	640.00	
"The Entiat runs through the N.		

TIMBERED LANDS—	Acres	Stumpage (ft.)
W. corner and Stormy Creek through nearly the center. It will make a fine farming and fruit and stock ranch. I estimate it will cut		6,000,000
"All of section 25	640.00	
"There is 250 acres of fine wheat land on this section; there is water across the E. ½ and N. W. ¼; small fruit tracts along the water. I estimate this will cut		6,000,000
"The west half and S. E. ¼ of section 27	480.00	
"This is a stock ranch, considerble of it is quite level. I estimate this will cut		5,500,000
"All of section 29	640.00	
"Mad Creek and two of its branches run into and through it; it is principally a stock ranch property; everything for home consumption can be raised and some crops for the market. I estimate this will cut		4,500,000
"All of fractional section 31	647.52	
This is exclusively grazing land; there is water running nearly through it. Estimate it will cut		4,000,000
"All of section 33	640.00	
"This will make a much better		

TIMBERED LANDS—	Acres	Stumpage (ft.)
stock ranch than section 31. It has water well distributed and some fruit lands. I estimate it will cut		6,000,000
"The W. ½ of N. W. ¼, S. W. ¼ and the S. W. ¼ of S. E. ¼, section 35	280.00	
"The Entiat River runs through this section. The S. W. ¼ of this 280 acres is good wheat land. A part of the balance is in the Entiat bottom and is worth $75.00 per acre, the balance is grazing. I estimate it will cut		1,500,000
"Township 24, *Range* 20.		
"All of fractional section 1	668.28	
"This is stock ranch property; water is supplied on it near the S. quarter post from a spring that empties into the Columbia River. Two branches of a creek north of it run nearly to the center of section. I estimate it will cut on the N. W. slope		1,000,000
"All of fractional section 3	669.06	
"This is also a stock ranch property; the creek, the branches of which run into section; one runs through the N. ½ of this section. It will cut about		2,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of fractional section 5 ----	671.08	
"A creek emptying into the Entiat heads in this section. 320 acres of it is good wheat land; the S. 160 acres breaks over the divide to the Swakane River and is untimbered grazing land. This section, I estimate, will cut --------		4,000,000
"All but the S. ½ of S. W. ¼ of section 7 ----------	580.00	
"The Swakane River runs through the S. W. ¼ of this section. It is only fit for a stock ranch, etc. I estimate it will cut		1,000,000
"All of section 9 ----------	640.00	
"This also is only fit for a stock ranch; it has water on three-fourths section. It will, I estimate, cut ----------		1,000,000
"All of section 11 ----------	640.00	
"This is a stock ranch proposition; a creek that empties into the Col. River runs through it. I estimate it will cut ----------		2,000,000
Township 24, *Rangs* 20—*Contd.*		
"All of section 15 ----------	640.00	
" A branch of the Swakane runs through it ;it is best adapted for a stock ranch, etc. I estimate it will cut ----------		1,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of S. ½ of setcion 17, except 10 acres in the N. E. corner	310.00	
"The Swakane runs through the east end of it. It is principally grazing land. I estimate it will cut		1,000,000
"All of section 21 except the N. E. ¼	480.00	
"The Swakane runs through this section; the land is nearly all grazing property. I estimate it will cut		1,000,000
"All of section 23	640.00	
"This section will make a good stock ranch, etc.; water from it flows to the Swakane on the south and the Columbia on the east. I estimate it will cut		2,000,000
"All but the N. ½ of the N. E. ¼ of section 27	560.00	
"This is stock ranch property; there is water on north and south of section. I estimate it will cut		2,000,000
"Lots 2, 3 and 6, N. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼, section 25	240.00	
"This borders on the Columbia River; it can be irrigated and is valuable. It is timberless.		

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of section 33 ----------	640.00	
"This is timberless, or nearly so. It will make a good stock and wheat ranch. It is well supplied with water.		
"*Township* 25, *Range* 20.		
"Lots 1, 2 and 3, S. ½ of N. E. ¼, S. W. and N. E. ¼ of S. E. ¼, section 1 ----------	401.30	
"200 acres of this is good wheat land; it has water, also some timber on the N. E. ¼.		
"The N. E. ¼ and E. ½ of S. E. ¼, section 3 ----------	242.80	
"Part of this can be irrigated. It is timberless.		
"All of section 11 but 40 acres in the S. W. corner ----------	600.00	
"The Entiat runs along the south line, and through the S. W. corner there is a little timber on the north end of this section. The S. E. ¼ of S. W. ¼ may be used for a manufacturing plant.		
"The N. E. ¼ of N. E. ¼, section 13 ---------- ----------	40.00	
"This is timberless, or nearly so; it would sell readily to adjoining ranchers.		

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of fractional section 19 ___	642.61	
"This section is stock ranch, wheat and fruit proposition; it is well watered from branches of Roaring Creek. I estimate it will cut _____		6,000,000
"All of section 21 _____	640.00	
"This largely a stock ranch proposition, two branches of a creek emptying into the Entiat run well into it. I estimate it will cut ____		6,000,000
"Township 25, *Range* 20—*Contd.*		
"All of section 25 _____	640.00	
"This is a stock ranch, etc., proposition; it has water and will cut		4,000,000
"All of section 27 _____	640.00	
"A creek emptying into the Entiat runs through this section. It is a good general ranching proposition. I estimate it will cut _____		6,000,000
"All of section 29 _____	640.00	
"This is a good section for many kinds of crops. It will cut _____		8,000,000
"All of section 31 _____	640.85	
"This is a stock, etc., proposition. I estimate it will cut _____		5,000,000
"All of section 33 _____	640.00	
"One third of this is wheat land; it should be used for general pur-		

TIMBERED LANDS—	Acres	Stumpage (ft.)
pose; it is well supplied with water. I estimate it will cut		4,000,000
"All of section 35	640.00	
"This is a stock ranch proposition, has water and will cut		4,000,000
'Township 26, *Range* 20.		
"All section 1	637.73	
"This is a fine farming fruit and stock proposition; it has three branches of Mad Creek running through it. I estimate it will cut		6,000,000
"All of section 5	634.57	
"This is 50% wheat land; it can be worked to advantage for many purposes; it is also supplied with water. I estimate it will cut		5,000,000
"E .half lot 4, and S. E. ¼ of S. W. ¼ of section 7	401.13	
"It will make a good fruit and stock ranch. The Entiat runs through the west eighty of this section. I estimate it will cut		2,000,000
"All of section 11	640.00	
"This has two branches of Mad Creek running through it. It is a fine fruit, wheat, general farming and stock proposition. I estimate it will cut		7,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of section 13 ----------	640.00	
"This is a general farming and stock proposition; it has water in four places on E. S. and W. sides. It will cut ----------		6,000,000
"All of section 15 ----------	640.00	
"Two-thirds of this is wheat land. It has water on N and E. sides. I estimate it will cut ----------		5,000,000
"All of section 21 ----------	640.00	
"This is a wheat and stock proposition. I estimate it will cut ----		4,000,000
"Township 26, *Range* 20—*Contd.*		
"All of section 23 ----------	640.00	
"This is a wheat, fruit and stock proposition. I estimate it will cut		5,000,000
"All of section 25 ----------	640.00	
"This is 60 % farming, balance stock proposition. It has water near every corner, and elsewhere. I estimate it will cut ----------		5,000,000
"All of section 27 ----------	640.00	
"This is a stock proposition; it has water from north to south, through the center thereof. I estimate it will cut ----------		5,000,000
The E. ½ of N. E. ¼, W. ½ of N. W. ¼ of N. W. ¼, S. W. ¼ and all of S. E. ¼ but N. E. ½, section 29	480.00	

TIMBERED LANDS—	Acres	Stumpage (ft.)
"This is a good fruit and stock ranch proposition; the Entiat and Mad Creek runs through it. It will cut		2,000,000
"All of fractional section 31	645.04	
"This is a stock ranch proposition, has plenty of water. I estimate it will cut		6,000,000
"All of section 35	640.00	
"This is a wheat and stock proposition; it has water through it from east to west. I estimate it will cut		6,000,000
"Township 27, *Range* 20.		
"All of section 19	635.04	
"50 % of this is wheat land, balance stock, etc. I estimate it will cut		8,000,000
"The S. half of the S. half, section 21	160.00	
"Potato Creek runs through this; it is all good land. I estimate it will cut		2,000,000
South half of N. half and south half of section 27	480.00	
"Nearly all of this is wheat land; it has water from a branch of Mad Creek; it for other crops. I estimate it will cut		6,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"All of section 29	640.00	
"There is some wheat land on this; Potato Creek runs through it; it is best for a stock ranch. It will cut		8,000,000
"All of section 31	632,23	
"This will make a good wheat, stock and fruit ranch; the Potato Creek runs through it. It will cut		8,000,000
"All of section 33	640.00	
"This is practically all wheat, etc., land; a branch of Mad Creek runs through it. I estimate it will cut		8,000,000
"All of section 35	640.00	
"This is a wheat and stock proposition, also some orchard lands for a mile along the east line; the Mad Creek runs through it. I estimate it will cut		6,000,000
"*Township* 25, *Range* 21.		
"All of section 5	641.36	
"The N. E. corner of this is very close to the Columbia River; part of it can be irrigated from the river in time; a line water supply may reach it. It is timberless.		
"All of section 19	639.98	
"This joins the City of Entiat; it		

TIMBERED LANDS—	Acres	Stumpage (ft.)
is grazing land and is timberless.		
"All of section 31 ----------	641.94	
"A half mile of this fronts on the Columbia River, and a creek runs through it from the west. It is a fruit and stock ranch proposition. I estimate it will cut ----------		2,000,000
"*Township* 26, *Range* 21.		
"S. E. ¼ of N. W. ¼, N. W. ¼ of S. W. ¼, S. ½ of S.½ of section 5 ----------	240.00	
"This is 50% fruit and farming land; it has water to irrigate for fruit; balance is grazing land. I estimate it will cut ----------		500,000
"All of section 17 ----------	640.00	
"This is a fine orchard and stock proposition; it has considerable water for irrigating; it is quite valuable. I estimate it will cut --		2,000,000
"All of section 7 ----------	653.54	
"This is a general purpose proposition, principally stock. I estimate it will cut ----------		5,000,000
"All of section 19 ----------	653.12	
"This is a wheat and stock proposition; it has lots of water well distributed. I estimate it will cut		3,000,000

TIMBERED LANDS—	Acres	Stumpage (ft.)
"West half lots 3 and 4, S. W. ¼ of S. E. ¼, Sec. 29	416.84	
"The lots face on the Columbia; some good fruit orchards can be irrigated on them. I estimate it will cut		1,000,000
"All of section 31	651.84	
"This is a wheat and stock proposition. I estimate it will cut		3,000,000
"Township 27, *Range* 21.		
"Lot 4 and S. E. ¼ of S. W. ¼ of section 31	83.48	
"This is a fine piece of land. I estimate it will cut		900,000
"Township 24, *Range* 21.		
"Lots 2, 3, and 6. East half of N. W. ¼ and N. E. ¼ of section 7	240.00	
"This is on the Columbia River; it is good property but timberless.		
"Lot 2, section 19	40.00	
"This is facing on the Columbia and is very valuable.		
"Total	49,022.08	349,350,000

"I believe my estimates of this timber is conservative. However, the nature of my cruise is such I will not positively say that I am sure of more than three million feet. Thirty-eight thousand acres of it is timber, eleven thousand without timber. Thirty-five acres is well tim-

bered and from data I took in cruising it, I am reasonably sure it will average 9 M. to the acre.

"I have taped and made actual scale per acre of the various yields per acre, and I have also scaled with a log rule timber cut on adjoining land. The following is the actual scale of one acre cut into saw logs on adjoining land:

Scale of saw logs cut on one square acre of Joe Oberley's Homestead, in Section 31, *Township* 27, *Range* 21.

Each tree scaled separate.

Top M'sure feet	Butt M'sure feet	Length inches	Scale inches	Total feet
22	24	14	283	
21	22	16	289	
15	21	16	121	693
—	—	—	——	
"Top log in limbs uncut it would make fruit boxes.				
18	21	16	169	
15	18	18	121	
13	15	14	71	361
—	—	—	——	
14	15	81	81	
13	14	16	75	
10	12	16	36	192
—	—	—	——	
17	18	16	169	
16	17	16	144	
14	16	16	100	

Top M'sure feet	Butt M'sure feet	Length inches	Scale inches	Total feet
10	14	16	36	449
—	—	—	——	
26	30	12	363	
24	26	14	350	
23	24	14	313	
20	23	14	224	
15	20	16	121	1371
—	—	—	——	
21	23	14	253	
19	21	14	197	
16	19	16	144	
12	16	12	48	642
—	—	—	——	
24	26	14	350	
21	24	16	269	
18	21	12	147	
13	18	16	81	867
—	—	—	——	
26	30	36	1088	
21	26	30	542	1630
—	—	—	——	
26	28	12	363	
24	26	14	350	
21	24	14	253	
17	21	14	169	
13	17	14	81	1316
—	—	—	——	
36	40	16	919	

Top M'sure feet	Butt M'sure feet	Length inches	Scale inches	Total feet
32	36	16	732	
30	32	16	653	
28	30	16	578	
25	28	16	455	
21	25	16	308	
15	21	16	146	
10	16	16	36	3828
—	—	—	——	
38	44	16	1107	
34	28	16	877	
31	34	16	721	
28	31	16	579	
25	28	16	452	
22	25	16	339	
17	22	16	183	
12	16	16	69	4329
—	—	—	——	
36	38	16	919	
33	36	16	780	
30	33	16	653	
27	30	16	545	
24	27	16	401	
21	24	16	308	
15	21	16	146	
10	15	16	36	3788
—	—	—	——	———
Total				19,464

"I submit the scale of this acre as it is. Positive information upon diameter, taper and length of trees. The three largest trees may be one lt ft.—log longer than the average of all equally as large on the tract. On the other hand, large trees can be found made larger. I have counted up acres with 40 trees, many of which are as large as those shown in this scale, and none smaller. I have given in all 60 days of travel through this timber in the last year, constantly taking data and making calculations as to its value and that of the land. I have also been engaged by other lumbermen in this state and Oregon to set forth the practical side of other lumbering propositions for the last three years.

"In all my examinations, I have not found a proposition that will pay the profits that I believe this will.

"Very respectfully yours,

(Sgnd.) THOS. WINSOR.

"THOS. WINSOR."

Q. Mr. Winsor, what else, if anything, did you then do in regard to the handling of this tract of timber?

A. Following the report, the bonding Company sent out an expert, so we went through the tract again with the expert, and he checked up my report. Following the making of these reports, the Bonding Company sent their expert here and I went through the tract again, when he checked up my report.

Q. Who was the expert? What was his name?

A. Mr. Elam, W. M., I think.

Q. I will call your attention, Mr. Winsor, now to what purports to be a prospectus of the F. P. Kellogg

Lumber Company, signed by what purports to be A. W. Elam. Have you looked over this?

A. Yes, sir, I have.

Q. What is it?

A. It is a copy of a report. It is a prospectus of the Bonding Company, putting up to buyers, to sell the bonds, and in it is contained a copy of the report of Elam to the Bonding Company.

MR. HADLEY: I will offer this instrument now in evidence.

MR. EMRY: I object to that as entirely incompetent and immaterial. It is a printed prospectus of the Bonding Company to sell some bonds.

Q. Did you ever see the report?

A. I never saw the report, no.

THE COURT: Objection sustained.

Q. Mr. Winsor, are there any contracts in writing or anyother dealings between you and Mr. Kellogg and the Lumber Company that you ever saw?

A. No.

Q. After this agreement, this escrow agreement and those contracts we have just introduced, were executed, did the Columbia River Lumber Company ever consult you any further with regard to the transaction with Mr. Kellogg?

A. Not a word.

Q. Never conveyed any of it to you at all or spoke to you about it?

A. No.

Q. Mr. Winsor, after this contract had been entered into and you had made your reports, what, if anything, did you do with regard to the stock?

A. Well, as soon as I was informed by F. P. Kellogg that the deal was closed, I sent a telegram to Mr. Selover to forward me my stock by express.

Q. And what did Mr. Selover say?

A. He didn't say anything; he didn't reply.

MR. EMERY: If you have the telegram, that is the best evidence of what he said.

Q. You have the telegram?

A. Yes, it is in the files.

Q. The original telegram?

A. The original telegram. You have got it in your files there.

Q. Well, did Mr. Selover return that telegram to you?

A. No, I got that telegram—oh, no, I have got a copy. Icopied it.

Q. Did you get any reply from Mr. Selover?

A. No; no reply.

Q. When, then, if at all, did you hear from Mr. Selover or anyone with regard to your stock in this Company?

A. Well, I couldn't tell you without referring to communications I received from him.

Q. I will call your attention then to this letter and ask you to state what it is, if you know?

A. That is the letter I received from Mr. Selover in answer to one I registered. I sent several letters

and he answered none of them and I registered one finally. I sent several letters after I sent the telegram and couldn't get any reply, and then I sent one by registered mail.

Q. When?

A. About November, 1911. It followed some months after the closing of this deal, which, I believe, was closed in the early spring.

Q. And this is the letter which you received from Mr. Selover.

A. Yes.

Q. Then, did you receive any other communications from Mr. Selover except this?

MR. EMERY: I want to read this over.

MR. HADLEY: All right. I beg your pardon.

MR. EMERY: Oh, we do not object to this. We do not object to this.

THE COURT: Admitted.

MR. HADLEY: I read now from plaintiff's exhibit No. 16, as follows:

"Minneapolis, Minn., Nov. 7, 1912.

"Mr. Thomas Winsor, Seattle, Wash.

"My dear Mr. Winsor:

"Your correspondence has not had as much attention as it should, perhaps, on account of my absence from the city and other pressing matters, but I am now prepared to take it up with you fully.

"The orignal transaction, whereby, under certain circumstances, you were to become the owner of a cer-

tain amount of preferred stock in a corporation to be formed, was never carried out.

"Without going into the exact details, you must know that the deal that you had framed up there involved Kellogg's ownership of the stock, we to own preferred stock to represent our future payments, and that also we were to be guaranteed payment of that preferred stock by a surety bond. You must know that that bond never was furnished, and that in consequence thereof Mr. Kellogg utterly failed to comply with the conditions.

"This resulted in that whole form of transaction falling to the ground, as without the security of the bond, our people absolutely refused to turn over the title to the property to a corporation in which Kellogg owned any of the stock until we were paid our price, so I had to revamp the whole matter in November in Chicago, which we did, to make a long story short, on the basis of a new corporation being formed to be called the Kellogg Lumber Company, and that all of the stock of that corporation should be issued to us. That we should then give Kellogg an option to buy the stock, common and preferred, with certain exceptions for a certain amount which was, I think, $145,000.

"A bond issue of $250,000 was provided for against the property of the Company, and Kellogg's common and preferred stock is subject to this bond issue. Mr. Kellogg has not now, and never will have, any ownership of any of the stock of the Kellogg Company until that $145,000 and interest is paid. In other words, we do not sell him

Q. Well, did he make it in writing or was it an oral request?

A. Well, he made an oral request and then he handed me a document to sign.

Q. Did you sign that?

A. No, I didn't sign that.

Q. This was in lieu of that document?

A. I signed that in lieu of the one he gave me.

MR. EMERY: This is a letter that is not addressed to the F. P. Kellogg Lumber Company, and not the Columbia River Lumber Company. It is not binding in any particular, and I object to it as being incompetent, irrelevant and immaterial. As counsel said, it is in response to a request by F. P. Kellogg as to what should be done with the stock.

THE COURT: Objection at this time is sustained.

MR. HADLEY: Well, I will bring it up later.

THE COURT: Yes.

Q. Mr. Winsor, what has been your occupation?

A. I have been a lumberman all my life.

Q. Have you been engaged in the lumber business--acquainted with lumber and timber values in the State of Washington?

A. Yes, sir.

Q. How long?

A. 27 years.

Q. Mr. Winsor, I believe you said you made a careful cruise and estimate of the value of the timber and the land belonging to the Columbia River Lumber Company in Chelan county?

A. I did. I appraised the timber and I appraised the land.

Now, Mr. Winsor, from your appraisal of the timber and the lands, what ,i nyour opinion, is or was the value of them at that time?

MR. EMERY: That is objected to as incompetent and immaterial under the pleadings. No value alleged of the stock anywhere.

THE COURT: Let him answer.

A. My valuation would be a minimum of $600,000, lands, timber and all.

Q. Is that the timber, or timber and lands both?

A. The timber and lands.

Q. Mr. Winsor, did you ever receive any stock from the F. P. Kellogg Lumber Company, or any other stock from the Columbia River Lumber Company.

A. No, sir.

Q. Have you ever received any money or cash or anything of value from them?

A. No, sir.

Q. Mr. Winsor, did you ever give anyone any authority to repersent you in any change to be made between tne Columbia River Lumber Company or F. P. Kellogg, or the F. P. Kellogg Lumber Comapny with regard to the sale of those lands under contract?

MR. EMERY: This matter is not pleaded and we are not charged with anything of that kind.

THE COURT: He may answer.

A. No, I did not.

Q. Did you have any knowledge that any change was

to be made between the Columbia River Lumber Company and F. P. Kellogg, or the F. P. Kellogg Lumber Company with regard to the contract in the record?

MR. EMERY: I think that is also immaterial and I object to it.

THE COURT: Objection overruled.

A. Not until I received that order from Mr. Selover.

Q. The one I just read to the jury?

A. Yes.

Q. Mr. Winsor, it is alleged in your complaint—you alleged in your complaint that you assigned your interest and claim against the Columbia River Company to the plaintiff in this action, Mr. Shields; is that correct?

A. That is correct.

MR. EMERY: If that is correct, there must be some evidence of it.

MR. HADLEY: I am going to show it.

Q. I call your attention to that instrument, and state what it is,if you know?

A. It is an assignment by myself, to Thomas Shields of this claim.

Q. Of your claim?

A. Yes, sir.

MR. HADLEY: I offer it in evidence.

THE COURT: Let it be marked.

MR. EMERY: We object to it as being incompetent and immaterial under the pleadings.

THE COURT: Objection overruled.

Whereupon said instrument was marked plaintiff's exhibit 17 and read in evidence as follows:

"Seattle, Washington, April 25, 1913.

"For value received, I hereby sell, assign and set over to Thomas Shields, all my right, title, claim and interest in and to a certain contract or agreement for commission entered into by me with the Columbia River Lumber Company wherein an dwhereby upon the sale of certain property of the Columbia River Lumber Company I was to receive a commission for my services in negotiating the sale of the property to the said Columbia River Lumber Company an dmaking reports thereon, of Ten Thousand (10,000) shares of the capital stock of the Kellogg Lumber Company, a corporation, and I do hereby assign and set over all of my interest in said contract and in said stock, or any moneys derived in lieu of said stock, to my assignee, Thomas Shields, hereby granting unto him full power and authority to act in any manner he may deem best for the collection thereof.

"THOMAS WINSOR."

Cross-Examination.

By MR. EMERY:

Q. Mr. Winsor, your first talk about selling this property was had with whom?

A. Charles A. Murray.

Q. About when?

A. About August, I think, 1910.

Q. Well, did you have any writing from Mr. Murray authorizing you to sell that property?

A. There was correspondence between us.

Q. You had some letters between you and Mr. Murray signed by Mr. Murray individually?

A. Yes, sir.

Q. And by you individually?

A. Yes.

Q. And did you ever have any writing signed by the Company at that time, or about that time, authorizing you to handle the property?

A. No, sir.

Q. Your transactions were all had directly with Mr. Murray?

A. Yes, sir, in 1910.

Q. And did you ever have any other contract for the payment of commissions than the one that you have introduced here as signed by Mr. Aldrich as chairman of the Sales Committee, being plaintiff's exhibit 12?

A. Mr. Aldrich gave me that.

Q. Did you have any other than that?

A. Yes, sir.

Q. Where is it?

A. In the escrow agreement.

Q. And that is the only one besides that?

A. This is my authority as an agent of the Company.

Q. That is the only authority you had up to the time of the escrow agreement that you had?

A. From Mr. Murray.

Q. Did you have any written authority from Mr. Murray?

A. Yes, sir; in the correspondence between us.

Q. Your correspondence is in evidence here?

A. No, I don't think it has been put in evidence. It is here, though.

Q. Now, aside from this paper, exhibit 12, and the escrow agreement which is here in evidence attached to the contract of August 23rd, you have offered here no other proof of any contract in writing, have you?

A. Well, there was the agreement between F. P. Kellogg Lumber Company and the Columbia River Lumber Company, which is referred to in the escrow agreement.

Q. That is all part of the August 23rd agreement?

A. Sir?

Q. That you claim is part of the August 23rd agreement?

A. Yes.

Q. Were you present when this August 23rd agreement was made?

A. Yes, I think I was.

Q. Where was it made?

A. In Mr. Aldrich's office, I think.

Q. Well, was it signed there by the parties?

A. I believe it was; my memory is that it was.

Q. Who signed it there for the Columbia River Lumber Company?

A. Mr. Aldrich.

Q. Why, this contract purports to have been signed by Mr. Selover.

A. Mr. Aldrich or Mr. Baldwin signed the first one.

Q. This contract you offered in evidence purports to be signed by Mr. Selover and Mr. Baldwin.

A. Mr. Baldwin was present in Mr. Murray's office and it was sent to Minneapolis for Mr. Selover to sign.

Q. Mr. Baldwin didn't sign it?

A. He was there and signed it.

Q. Signed it?

A. I am not sure whether it was that instrument; there was an option signed also.

Q. If you have any other documents which refers to those transactions, let us have it; that establishes the contract between you. Now, referring to the agreement of August 23rd, which apepars to have been signed by Mr. Selover, Mr. Darling, and Mr. Kellogg, I will ask you if, to your knowledge, Mr. Kellogg ever organized the F. P. Kellogg Lumber Company or any other corporation for the purpose of taking over this land under the laws of the State of Washington?

A. I don't know for sure what date he organized it.

Q. Do you know whether he ever organized a corporation for the purpose of taking over this land having a capital stock of $225,000?

A. Not outside of the agreements we entered into; I do not know whether any other change was made.

Q. Do you know whether Mr. Kellogg ever delivered to the Columbia River Lumber Company any bond, surety bond, providing a guarantee to them of the payment of the balance of the money they loaned?

A. I do not.

Q. Do you know of his giving to the Union Trust Company or anyone else such a bond?

A. I do not.

Q. For the purpose?

A. I do not.

Q. Do you know of his filing with the Union Trust Company an agreement to pay $2.00 a thousand for the lumber manufactured and the further sum of $2 a thousand on the purchase price?

A. I do not know.

Q. From the sale of lumber from the timber land, should be applied solely to the unpaid purchase price?

A. Do I know?

Q. Do you know that he filed such an agreement with the Union Trust Company for the Columbia River Lumber Company or anybody else?

A. I do not know whether he filed it or not?

Q. Then you do not know of your own knowledge that this agreement of August 23rd was complied with, do you?

A. I do not know; I know nothing about it.

Q. But you did introduce Mr. Selover's letter in which he told you this agreement was not carried out.

A. That was long after the transaction had been closed.

Q. Did you investigate it to find out whether those statements were true or not?

A. Did I investigate it?

Q. Yes.

A. Why, I had his information there.

Q. And you knew nothing to the contrary but what those statements were true?

A. No, I didn't investigate it; I left it in my attorneys' hands as to the investigation about that.

Q. Do you know anything to the contrary, whether those statements are true or not?

A. No.

Q. You assumed them to be true?

A. What?

Q. The statements in Mr. Selover's letter of October the 16th.

A. I didn't assume them to be true. I contend some deal was carried out with Mr. Kellogg in a little different way.

Q. Do you know under what laws or under what state the F. P. Kellogg Lumber Company was organized?

A. I do not.

Q. Do you know what the amount of the capital stock was?

A. It was first had under the laws of Washington.

Q. Do you know what the capital stock was to be?

A. It was $225,000.

Q. Do you know what it is?

A. No; $145,000 of preferred stock, and then there was $300,000 of common stock.

Q. That corporation calls for $125,000 of common stock to be turned over to the Kellogg Lumber Company and turned over to them, do you know that kind of a company was organized—you said you do not know?

A. There was some changes made in the contract.

Q. Then the contract as made by you was not carried out?

Q. Yes, it was carried out.

Q. How do you know? What do you mean by saying it was carried out? What was done about it?

A. Mr. Kellogg went into possession.

Q. As proprietor or as managing agent for them?

A. I understand—

Q. What do you know of your own knowledge?

A. I don't know only what I am informed.

Q. I didn't ask you what you were informed.

THE COURT: Proceed.

Q. Do you know whether Mr. Kellogg ever furnished the Company with that insurance policy or $50,000 for the payment of that balance?

A. Only what he said, that he did.

Q. Don't you know as a fact that he did not? Haven't you been so informed by Mr. Clark that he could not furnish that contract?

A. No, sir; I have been informed to the contrary. I am sure that I am informed that he did furnish it.

Q. Your agreement with Mr. Kellogg was that he was to buy the property for how much?

A. $225,000.

Q. Now, how was he to pay for it?

A. He was to pay for it by paying $80,000 out of the bond money.

Q. In other words, they were to put a mortgage on it for $80,000, and the Columbia River Lumber Company was to have the money?

A. He then was to set aside out of the timber $2 a thousand for the specific purpose of paying off this $145,000 of preferred stock.

Q. Well, who was to have that?

A. That was to be paid upon this $145,000 of preferred stock deposited with the Union Trust Company of Chicago.

Q. For whom?

A. For the redemption of this preferred stock.

Q. Whose was that?

A. $5,000 of my own and $5,000 was R. H. Steeves, and the balance the Columbia River Lumber Company.

Q. You were to pay $145,000 to them out of the timber sawed on this land, and there was, in your honest opinion—this land and this timber was worth $600,000?

A. Yes.

Q. And you sold it for $225,000, and the Company got nothing but the mortgage they put upon it, and you ask for your commission for doing that kind of business?

A. I informed Mr. Aldrich.

Q. That is your position, that the timber was worth $600,000, you were selling it for $225,000, the contract was never carried out, and it was modified materially and you were to have $10,000 commission?

A. If Mr. Kellogg accepted it.

Q. But you do not know whether Mr. Kellogg ever carried out his offer?

(No response by witness to last preceding question.)

(Whereupon a short recess was taken.)

(Witness excused.)

C. R. ALDRICH, called as a witness on behalf of the Plaintiff, being first duly sworn, testified on oath as follows:

Direct Examination.

By MR. HADLEY:

Q. Mr. Aldrich, you are one of the members of the Columbia River Lumber Company?

A. Yes, sir.

Q. What official capacity, if any, did you have in the year 1911?

A. None whatever.

Q. You had none. I will call your attention to this instrument here.

THE COURT: What exhibit is it?

MR. HADLEY: No, that is not admitted yet.

A. This doesn't show me holding any office.

Q. In what capacity, if any, did you act in regard to this corporation?

A. I tried to assist in getting a purchaser for it and dispose of the property.

Q. I will call your attention to this letter of July 3rd, 1911, in which you sign C. R. Aldrich as member of the—or chairman of the Sales Committee; is that the way it is signed there?

A. Yes, but that is not necessarily an office of the Company.

Q. Leaving aside the office that you had; what is the duty of the Sales Committee? What was that composed for? who composed it, and what was its duties?

A. In an effort to make a sale.

Q. Who were the other members besides Mr. Darling?

A. Who?

Q. No, I don't mean Mr. Darling; Mr. Baldwin—who were the members of the Sales Committee then?

A. I don't remember who the third member was; I think it was Mr. Selover.

Q. Where did this Sales Committee originate from? What power did it have?

A. None whatever.

Q. Didn't have any power; did it have any corporation—who created it? how was it created?

A. My recollection is that that was a matter of correspondence leading up to the business negotiation or sale.

Q. And there was a Sales Committee appointed by the Company?

A. I do not know as to that; I do not recall.

Q. You understood you were a member of the Sales Committee, Chairman?

A. I signed that letter in that way at the request of Mr. Winsor.

Q. How did Mr. Winsor come to ask you to sign as Chairman of the Sales Committee?

A. He wanted to have something to show that he was negotiating with some parties.

Q. Did Mr. Winsor draw this instrument?

A. No, I don't think so; part of it is his.

Q. I am not talkin about the body, how it come to be signed there by you?

A. He wanted it.

Q. Did you have any talks with Mr. iWnsor about that time?

A. Yes, repeatedly.

Q. Looking to the sale of the property?

A. Yes.

Q. What price were you asking for that property?

MR. EMERY: I object to that as being immaterial. The whole matter is in black and white.

THE COURT: Now, was that contract carried out? I don't think that the answer—

MR. HADLEY: I will withdraw the question.

Q. Did Mr. Winsor ever come to you or make any demand or say anything to you about getting his stock from the Columbia River Lumber Company?

A. Not that I remember of.

Q. You do not remember of him coming to you and asking about his stock, but you said you were writing to Mr. Selover about it.

A. There may have been a question similar to that. I think I do recall a question similar to that along in 1913 sometime, probably; possibly in 1912. The latter part of 1912 I have a faint recollection of some such thing as that, about agreeing to write to Mr. Selover and requesting that he do the same thing.

Q. And yo uwrote that to Mr. Selover?

A. I think so. I do not recall positively that I did, but I think I did.

Q. Did you get any response from Mr. Selover?

A. Not that I recall, no.

Q. Do you remember telling Mr. Winsor that you had written two or three times to Mr. Selover and did not get any reply?

A. No, I do not.

Q. You do not remember having had any conversation with him at all where you made such a statement as that?

A. Yes, I talked with him once in a manner similar to that. I cannot recall the exact conversation, however.

MR. HADLEY: That is all.

MR. EMERY: That is all.

(Witness excused.)

F. P. KELLOGG, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows on oath:

Direct Examination.

By MR. HADLEY:

Q. F. P. Kellogg?

A. Yes, sir.

Q. And, Mr. Kellogg, you are the Kellogg mentioned in these numerous contracts and exhibits that have been introduced here as the person who negotiated for the purchase of timber lands in Chelan County, Washington, belonging to the Columbia River Lumber Company ?

A. Yes, sir.

Q. And, Mr. Kellogg, you, on the 23rd day of August, 1911, remember of entering into an agreement whereby you were to take or purchase all that property in a way?

A. Yes, sir.

Q. Now, after that agreement was entered into—those papers that are in evidence,—now, what then was done by you and by the Columbia River Lumber Company?

A. I organized a company known as the F. P. Kellogg Lumber Company, and issued bonds in the sum of $250,000.

Q. Now, about when did that take place?

A. Along in the middle of the summer.

Q. I will call your attention first to this instrument, Mr. Kellogg, and see if you can identify it?

A. That looks like one of the documents.

Q. This instrument purports to be a deed from the—I will read only a part of it to see what it is:

"THIS INDENTURE, made this 2nd day of May, in the year of our Lord one thousand nine hundred and twelve, between Columbia River Lumber Company, a corporation of the State of Minnesota, party of the first party, and F. P. Kellogg Lumber Company, a corporation of the State of Nevada, party of the second part,

"WITNESSETH: That the said party of the first part, in consideration of the sum of eighty thousand dollars ($80,000) and certain other valuable considerations, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, forever, all those tracts or parcels of land lying and being in the County of

Chelan and State of Washington, described as follows, to-wit:"

Now, this instrument purports to convey the title,—the property described in that instrument to the F. P. Kellogg Lumber Company. This is a certified copy from the records of Chelan County, and Iwill offer it in evidence.

(Whereupon said instrument was marked Plaintiff's Exhibit No. 18 and admitted in evidence. Here insert Plaintiff's Exhibit 18.)

Q. I will ask you to state whether or not the land described in that deed are the lands described in this contract and escrow agreement of August 23rd, 1911?

A. They are virtually the same. You will find a few mistakes in the descriptions, but they are virtually the same.

Q. Now after that—first you organized the corporation, I believe you say, where did you organize it?

A. It was organized in Seattle, but it was under the laws of the State of Nevada.

Q. Why did you organize a corporation under the laws of the State of Nevada instead of the laws of the State of Washington, as provided in this contract of August 23rd?

A. There were some things that we wished to do that we could not do under the laws of this State and we could do under the laws of the State of Nevada.

Q. Who suggested that you organize under the laws of the State of Nevada?

A. Why, I don't remember who suggested it; it was mutually agreeable between all parties concerned.

Q. Now, Mr. Winsor was not considered in the organization of that corporation?

A. Not directly, no.

Q. Now, I call your attention to this instrument, Mr. Kellogg.

MR. EMERY: Is that the deed?

MR. HADLEY: This is the trust deed.

WITNESS: Yes, I recognize that.

Q. What is this instrument?

A. That was the trust deed furnished.

MR. HADLEY: I will offer it in evidence.

MR. EMERY: I object to it as being immaterial and incompetent. The fact that this land was subsequently conveyed to some other corporation does not confirm this contract.

THE COURT: I will let it go in.

MR. EMERY: Note an exception.

(Whereupon said instrument was marked Plaintiff's Exhibit No. 19, and admitted in evidence.)

Q. Now, Mr. Kellogg, after the property was deeded to the F. P. Kellogg Lumber Company and this trust deed was executed, what then was done with regard to the transaction between you?—between them and the F. P. Kellogg Lumber Company and the Columbia River Lumber Company?

A. The company took over the property and proceeded to improve the property according to the stipulations in the agreement and trust deed.

Q. Was there any later agreement or transaction entered into between you and the Columbia River Lumber Company, any subsequent one to the one of August 23rd?

A. In regard to the purchase of the property?

Q. Yes, prior to the execution of this deed and the trust deed?

A. I don't know. There was several of those agreements entered into along about that time and they were remodeled. I don't understand exactly what you mean.

Q. Well, I will ask you to look over this, Mr. Kellogg.

(Counsel hands paper to witness.)

(Whereupon a short recess was taken.)

Q. (By MR. HADLEY.) What is that instrument?

A. That agreement was entered into at that time.

Q. On November 29th, 1911?

A. Yes, sir.

Q. This agreement followed up the agreement of the 23rd of August?

A. Yes.

MR. HADLEY: I will offer this in evidence.

MR. EMERY: You offer it in evidence?

MR. HADLEY: Yes.

MR. EMERY: We do not object to it.

(Whereupon counsel for plaintiff read said instrument, which was marked Plaintiff's Exhibit No. 20, as follows):

"THIS AGREEMENT made this 29th day of November, A. D. 1911, by and between the Columbia River Lumber Company, a corporation of the State of Minnesota, party of the first part, and F. P. Kellogg, of the City of

Seattle and State of Washington, party of the second part, Witnesseth:

"1. That there shall be organized by said second party a corporation under the laws of the State of Nevada to be known as the F. P. Kellogg Lumber Company and to be empowered to buy and sell timber and timber lands and to engage in the manufacture of timber products in all its branches.

"It shall be provided in and by such charter, among other things, as follows:

"(a) For five (5) directors, two (2) of whom shall be elected by and shall represent the Preferred Stock hereinafter referred to, and one (1) of whom shall be elected by and shall represent each One Hundred Thousand Dollars ($100,000) par value of the Common Stock hereinafter referred to.

"(b) That no additional stock shall be issued or authorized except by the written consent of the two directors hereinabove referred to as representing the preferred stock.

"(c) That no real property belonging to said corporatioon shall be sold or encumbered, and no lands or other property shall be purchased by the company with its funds, nor shall any indebtedness be incurred by it for such purpose without the consent of the said two directors so representing the preferred stock, such consent to be entered in the original minutes of the company.

"2. The capital stock of the said corporation shall be Four Hundred and Fifty Thousand Dollars ($450,000) in shares of One Hundred Dollars ($100) each, of which

One Hundred and Fifty Thousand Dollars ($150,000) par value in amount shall be six per cent. cumulative Preferred Stock and the balance shall be Common Stock; said Preferred Stock shall be preferred, both as to dividends and as to principal, and no dividends in excess of three per cent per annum shall be declared on the One Hundred Thousand Dollars ($100,000) of said Common Stock to be issued to Clark L. Poole & Company, as hereinafter provided, until all the said Prefererd Stock shall have been fully retired by the payment of par and all accumulated dividends thereon, and until such retirement of said Preferred Stock, no dividends shall be paid upon the balance of the Common Stock. The said Preferred Stock shall be redeemable at any time after there (3) years after the date of its issuance at par and accrued dividends, but the corporation shall have the right to re-purchase any of the Prefered Stock at any time prior to three (3) years from its date of issuance upon the payment of all accrued dividends thereon to the date of such re-purchase.

"3. The corporation shall authorize the execution of a trust deed covering a bond issue of Two Hundred and Fifty Thousand Dollars ($250,000) gross, in substantial accordance with an agreement now in existence between said second party and Clark L. Poole & Company of the city of Chicago, together with such bonds as are required to be issued in connection therewith, and shall sell the same to the said Clark L. Poole & Company upon the terms referred to in said other contract.

"4. That the party of the first part will transfer free and clear of all encumbrance but subject to mineral reservations and rights-of-way of the Northern Pacific Railway Company, and the Great Northern Railway Company, or its subsidiaries, also subject to such claims as may exist arising out of adverse possession and subject also to errors growing out of any necessary correction of the Government surveys, a tract of land in Chelan County, Washington, a full and complete description of which, marked 'Exhibit A' is hereto annexed and made a part hereof, said deed to run to said F. P. Kellogg Lumber Company and to be delivered to the Central Trust Company of Chicago, to be by it recorded when this transaction is carried out.

"In return for such deed the said party of the first part shall receive from the said Trust Company:

(a) Eighty Thousand Dollars ($80,000) in cash or its equivalent;

"(b) Certificates issued by the said F. P. Kellogg Lumber Company representing all of its said capital stock, made out to the party of the first part; and

"(c) A policy of insurance issued by some standard company upon the life of said second party hereto, in the sum of Fifty Thousand Dollars ($50,000), payable originally to the said second party or his estate and by him assigned to the party of the first part by an assignment absolute in form, said second party hereby agreeing to pay the premiums thereon for a period of five (5) years, payable annually.

"5. Said first party shall upon the completion of the bond issue assign to the said Clark L. Poole & Company, or their order, Common Stock of said Kellogg Lumber Company to the amount of One Hundred Thousand Dollars ($100,000) par value.

"6. Clark L. Poole & Company of Chicago, Illinois, shall be the registrars and transfer agents of the stock of said F. P. Kellogg Lumber Company, and said registrars shall stamp, or otherwise endorse, upon each certificate of stock, whether Preferred or Common, issued to the party of the first part, according to the terms hereof and excepting the One Hundred Thousand Dollars ($100,000) par value of Common Stock, which is to go to Clark L. Poole & Company, a clear and concise reference to this contract.

"7. The conditions respecting said life insurance policy are as follows:

"In the event of the death of said second party should occur prior to the time when the full payment shall have been completed to the party of the first part for the stock, as hereinafter set forth, the said Fifty Thousand Dollars ($50,000) shall be paid to the said second party and credited upon the balance unpaid upon said stock.

"In the event the balance should be less than the Fifty Thousand Dollars ($50,000), then such difference shall be paid to said Kellogg's personal representatives.

"8. And the said party of the first part hereby grants unto the said party of the second part the right and option at any time within five (5) years from January 1, A. D. 1912, to purchase of and from the said party of the

first part One Hundred and Fifty Thousand Dollars ($150,000) par value of the said Preferred Stock and Two Hundred Thousand Dollars ($200,000) par value of the said Common Stock for the sum of One Hundred and Forty-five Thousand Dollars ($145,000), together with interest on said last named sum at the rate of six per cent (6%) per annum from this date.

"Upon the full payment of which sum and interest by said second party, or his heirs or assigns, to the said first party in accordance herewith, the said stock shall be assigned by the said first party to the said second party or to his order or estate.

"And the said second party hereby agrees that he will buy the said stock at and for the said price and will pay for the same on or before five (5) years from January 1, 1912; and that at the end of each calendar year, commencing with the first day of January, 1913, he will pay to the said party of the first part hereto, an amount of money equal to Two Dollars ($2) for every thousand feet of lumber manufactured and sold by the F. P. Kellogg Lumber Company from the land hereinabove referred to, which said sum so paid each year shall be credited upon the principal and interest of said purchase price until the same shall have been fully paid.

"The by-laws of the corporation shall provide that the Board of Directors shall annually, out of the net profits, set aside the sum of at least Two Dollars ($2) for each thousand (1000) feet of lumber manufactured and sold during the preceding twelve (12) months for the purpose of paying the dividends on the said Pre-

ferred Stock and retiring the same, but such by-laws shall not require the directors to set aside the said sum of Two Dollars ($2) except out of net profits and shall permit the directors to reserve all net profits in excess of the said sum of Two Dollars ($2) for each one thousand (1000) feet of lumber so manufactured and sold for a surplus. All sums paid upon the said Preferred Stock either as dividends or for the retirement thereof shall be received by the party of the first part and credited upon the said sum of One Hundred and Forty-five Thousand Dollars ($145,000) and interest; and if such dividend in any year shall be less than a sum and amount equal to $2 per thousand feet upon all lumber manufactured and sold by the company during the then past calendar year, the said second party to personally furnish the balance of such installment.

"So long as the said second party shall pay annually to the said first party the amount above called for by this agreement, the said second party shall have and hold the proxies of the said first party to vote the $200,000 par value of common stock standing in its name and said party of the second part shall be the general manager of the operations of the Kellogg Lumber Company, and shall receive a salary at the rate of Three Thousand Dollars ($3,000) per annum during 1912; Four Thousand Dollars ($4,000) during 1913; and Five Thousand Dollars ($5,000) per year thereafter for his said services.

"Should default be made by said party of the second part in respect to any one or more of said annual payments so to be made upon such purchase of said stock,

or if the said second party shall default and refuse to perform the duty of general manager of the said Kellogg Lumber Company for said period, then, and in either such event, the option hereby granted to said second party to purchase the said stock shall, at the option of said first party, terminate without notice and without any right to reimbursement whatsoever on the part of the said second party on account of any sum or sums which may have, at the time of such default, been paid on account of such purchase, time being hereby declared to be of the essence of this agreement; and in the event of such default the said first party is to be relieved from any liability whatsoever to the said second party.

"In the event, however, such termination of services of said second party as such general manager shall have been brought about by his death, then it shall be optional with his personal representatives as to whether they will go on and attempt to carry out said contract, except that the funds received from the insurance company on the policy above referred to shall be applied as hereinabove set forth.

"9. This agreement shall not grant the said second party any rights or interests whatsoever in or to any of the said lands above referred to, but shall be held and considered to be for no other purpose than to give him an opportunity to purchase the said common stock and preferred stock under the conditions above set forth.

"It is further understood that the agreement heretofore set forth by said second party to purchase the said Preferred and Common Stock for the sum and upon the

terms hereinabove set forth, is conditional upon the title to the said lands, so to be conveyed by party of the first part, being good; and the second further condition upon the carrying out by Clark L. Poole & Company and the party of the second part of the agreement hereinabove made respecting the sale by the Kellogg Lumber Company and purchase by Clark L. Poole & Company of the bonds of the said Kellogg Lumber Company.

"Said first party shall upon the completion of the bond issue assign to the said Clark L. Poole & Company, or their order, common stock of said Kellogg Lumber Company to the amount of One Hundred Thousand Dollars ($100,000) par value.

"In Testimony Whereof the said party of the first part has caused the execution hereof by its president, attested by its secretary, and its corporate seal to be hereto affixed, and the said second party has hereunto set his hand, this 29th day of November, A. D. 1911.

"COLUMBIA RIVER LUMBER COMPANY.

"By GEORGE H. SELOVER, President.

"Attest:

"GEORGE B. DARLING, Secretary.

(Seal.) "F. P. KELLOGG."

MR. HADLEY: It is understood it is practically the same description of the lands as in that contract of August 23rd?

M. EMERY: Yes.

Q. (By MR. HADLEY) Now, Mr. Kellogg, after the execution of this agreement which you have just had your attention called to, what then was done with re-

gard to the organization of the F. P. Kellogg Lumber Company?

A. The Company was organized and everything was done in compliance with that agreement.

Q. Was the bond issue made?

A. Yes, sir.

Q. What became of the money derived from the bond issue?

A. It was expended in compliance with that agreement.

Q. Was $80,000 paid over to the Columbia River Lumber Company?

A. Yes, sir.

Q. And the remainder of the funds used—

A. To improve the property according to that agreement.

Q. When was the stock of the F. P. Kellogg Lumber Company issued, and who to?

A. I don't remember the exact date; sometime after the first of April, I believe; between that and the first of June.

Q. (By MR. EMERY.) Here?

A. It was issued here, I believe.

Q. (By MR. EMERY.) What year?

A. 1912.

Q. This contract was dated November 29th, 1912?

A. 1912, I believe.

Q. The stock was issued then some two or three months after the organization?

A. Yes; sometime later, but I don't remember.

Q. Sometime about the first of April?

A. Yes, sir.

Q. And the bond issue was then sold?

A. Yes.

Q. Who was that stock then delivered to?

A. Delivered to the Columbia River Lumber Company.

Q. And Clark Poole & Company?

A. Clark Poole & Company 100,000 shares.

Q. And the remainder to the Columbia River Lumber Company?

A. Yes, sir.

Q. Who, if you remember, were the officers, directors of the Columbia River Lumber Company?

A. Mr. Selover, Mr. Aldrich, and Mr. Baldwin, I believe—Mr. Darling, I don't remember which it is.

Q. Were you a director of the F. P. Kellogg Lumber Company?

A. Yes, sir; I was president.

Q. You were president of the F. P. Kellogg Lumber Company?

A. Yes, sir.

Q. Then, after the bond issue had been sold and the moneys distributed under the terms of the contract, as required, then what did the F. P. Kellogg Lumber Company attempt to do?

A. Proceeded to build a mill and open up the property.

Q. You started in and built what sort of a mill?

A. Sir?

Q. What sort of a mill?

A. We built an eight-foot band mill—modern mill.

Q. Were there any logs cut?

A. Yes, sir.

Q. About how many logs were cut?

A. About 7,000,000 were brought down the drive; between six and seven million.

Q. Any dam built or anything of that sort?

A. Yes; there was a 600 foot dam built; 600 foot dam built and cribs and dams, and all the necessary work.

Q. For the operation of the plant?

A. Yes, sir, and logging camps established.

Q. Mr. Kellogg, this last contract that I have just called your attention to calls for an insurance policy; state the reasons for giving the insurance policy. Did you give an insurance policy?

A. Yes, sir.

Q. Who did you deliver it to?

A. Columbia River Lumber Company.

Q. What amount was that policy?

A. $50,000.

Q. Same amount specified in the contract?

A. Yes, sir.

Q. Mr. Kellogg, in the agreement that is in evidence here of August 23rd, 1911, it was specified that a surety bond—you were to give a surety bond. Tell the jury why you did not; why you did not; why the surety bond was not furnished, and all about that transaction, and about this insurance policy?

A. Why, that matter was talked of, and I said I would give a surety bond if it was possible for me to get one. It was some insurance, and I attempted to get a surety bond, but no company would issue a bond of that nature and we afterwards agreed to the insurance policy.

Q. Who agreed with you to the insurance policy?

A. Columbia River Lumber Company.

Q. Who was acting for the Columbia River Lumber Company at that time?

A. Mr. Selover.

Q. Then that occasioned the entering into of this later agreement?

A. Sir.

Q. That occasioned the entering into of this last agreement of November 29th?

A. Yes, sir.

Q. When you agreed to give the insurance policy in place of the bond, that was satisfactory and they agreed to accept that?

A. Yes, they agreed to accept it.

Q. And waive the surety bond?

A. Yes.

Q. Now, was Mr. Winsor present when this last agreement was entered into? Where did you enter into that agreement?

A. I think that was entered into—it was threshed out in different places and through correspondence, but I think it was drawn up in Mr. Kellogg's office.

Q. Where?

A. Mr. Kellogg's office.

Q. I call your attention to one of the letters Mr. Selover addressed to Mr. Winsor and said in November he had to revamp the deal with you in Chicago?

A. November, what year?

Q. November, 1911?

A. Yes, I think that is correct.

Q. Then this is the contract that you referred to at that time, is it?

A. I think so; I believe so.

Q. Now, after this bond issue and the stock was issued and you went to work there, how long did you continue in the operation of those premises?

A. As an owner?

Q. Yes.

A. Till, I think, about the first of February last year.

Q. First of February, 1913?

A. Yes.

Q. There was a payment of interest that would fall due on the bonds in October, 1912, was that payment made?

A. Yes, sir.

Q. Now state how he came—state then what was done in February, 1913?

A. I went back to Chicago about that time and met with Mr. Selover and Clark Poole interests and talked over the proposition. Previous to that time it was agreed to advance extra money to carry on the business. I went ahead with the assurance—

MR. EMERY: Are you stating what happened orally or the contents of a writing?

A. This was not a contract in writing.

Q. (By MR. EMERY.) Letters or correspondence?

A. I have no correspondence.

Q. (By MR, EMERY.) Is this statement you are making contained in any correspondence?

A. Yes.

M. EMERY: Then I object to him stating what was in the writing.

A. (Continuing.) I will say all the letters I had regarding these transactions was removed during my absence over at the mill. I have no records whatever of any transactions that took place, letters or anything else.

MR. EMERY: You do not suspect Mr. Selover going out and taking them?

A. Yes, he came out and took them.

Q. (By MR. EMERY.) Have you served any notice on him to produce them in this case?

A. No, sir.

Q. Have you asked him for them?

A. I don't know what particular thing was mentioned in those—in that correspondence, but I know it was written between us. Those things were talked over in letters between us. What it was, I don't know; I don't remember.

MR. EMERY: I object to him stating orally the contents of the letters.

THE COURT: Yes. Proceed.

Q. (By MR. HADLEY.) Go ahead and state what you did.

A. Well, when I went back to Chicago at that time, Mr. Selover came on from Minneapolis and we talked over the proposition of the additional money that I was to get, and Mr. Selover objected to it, and it became apparent I would not have enough capital to carry on the business as orignally planned, and they talked the matter over there and they thought the best thing to do with the Company would be to sell it.

Q. Sell what Company?

A. Sell the F. P. Kellogg Lumber Company, and they represented that it would be impossible to sell the stock of that Company as long as I had an option on it, and wanted to know if I would relinquish my right that I had to that stock—my option to buy it, and, as I was very anxious to see the Company a success, and everything had been agreeable up to that time, I agreed to do so, which I did, entered into an agreement with them whereby—

MR. EMERY: If you entered into an agreement, let us have the written agreement. Here it is.

(Counsel for defendant hands witness paper.)

THE WITNESS: That is it.

MR. HADLEY: I will offer this.

Whereupon said instrument was marked plaintiff's exhibit No. 21 and admitted.

(Plaintiff's exhibit No. 21, read in evidence without objection as follows):

"THIS AGREEMENT, made and entered into this 8th day of February, A. D. 1913, by and between F. P. Kellogg, of Seattle, Washington, party of the first part, and Columbia River Lumber Company, a corporation of the State of Minnesota, party of the second part, witnesseth that:

Whereas, under date of November 29, A. D. 1911, the parties hereto made and entered into a certain contract in which it was provided, among other things, that Columbia River Lumber Company grant unto F. P. Kellogg the right and option at any time within five (5) years from January 1, A. D. 1912, to purchase from it One Hundred Fifty Thousand Dollars ($150,000), par value of the preferred stock, and Two Hundred Thousand Dollars ($200,000), par value of the common stock of said F. P. Kellogg Lumber Company, for the sum of One Hundred Forty-five Thousand Dollars ($145,000), together with interest on said sum at the rate of six per cent. (6%) per annum, and the said F. P. Kellogg agreed to purchase said stock and to pay for the same within said period, and also to pay on account Two Dollars ($2) for every thousand (1000) feet of lumber manufactured and sold by said F. P. Kellogg Lumber Company; and said contract further provided as follows:

" 'Should default be made by said party of the second part in respect to any one or more of the said annual payments so to be made upon such purchase of said stock, or if the said second party shall default or refuse to perform the duty of General Manager of the said Kellogg

Lumber Company for said period, then, and in either such event, the option hereby granted to said second party to purchase the said stock, shall, at the option of said first party, terminate without notice and without any right to reimbursement whatsoever on the part of said second party on account of any sum or sums which may have, at the time of such default, been paid on account of such purchase, time being hereby declared to be of the essence of this contract; and in the event of such default the said first party is to be relieved from any liability whatsoever to the said second party.'

"And, whereas, the party of the first part has failed to make payment as required in said contract, and is wholly unable to further carry out said option and all of the terms and provisions of said contract dated November 29, 1911:

"Now, therefore, in consideration of the sum of One Dollar, in hand paid to the party of the first part by the party of the second part, and for other good and valuable consideration, the receipt whereof is hereby fully acknowledged, it is mutually agreed by and between the parties hereto as follows:

"1. Said agreement of November 29, A. D. 1911, by and between Columbia River Lumber Company and F. P. Kellogg is hereby cancelled and declared null and void, and said F. P. Kellogg hereby transfers and assigns to said Columbia River Lumber Company all his right, title and interest in and to said agreement and all interest arising or to arise thereunder, and all right, title and interest which he may have in and to any

capital stock of F. P. Kellogg Lumber Company, free and clear of all liens whatsoever, and hereby releases and relieves said Columbia River Lumber Company from any further liability under said agreement.

"2. F. P. Kellogg, the party of the first part, agrees to deliver to the party of the second part as soon as practicable the resignations of himself as president and as director and the resignation of all other officers and directors which are his nominees of said F. P. Kellogg Lumber Company, and also of the Entiat Boom Company.

"In witness whereof, F. P. Kellogg, party of the first part, has signed and sealed this instrument, and Columbia River Lumber Company, party of the second part, has caused this instrument to be signed under its corporate name by a duly authorized officer and its corporate seal to be hereunto affixed, the day and year first above written.

"F. P. KELLOGG (L. S.)

"COLUMBIA RIVER LUMBER COMPANY,

"By GEORGE H. SELOVER,

"Its President."

Q. Mr. Kellogg, I want to call your attention—just read that instrument.

(Counsel for plaintiff hands witness paper.)

Q. (Continuing.) Did you receive an instrument of that sort from Mr. Winsor?

A. I believe so. I recognize that.

Q. What was the occasion of your requesting a letter of that sort?

A. We delegated the Union Trust Company as a trustee of that stock originally and afterwards it was not agreeable to the Clark Poole Company on account of their doing business with the Central Trust Company of Illinois, and was changed at that time and, I believe, that was at the request of the Columbia River Lumber Company.

Q. Did they request you to get anything from Mr. Winsor in regard to the handling of that stock?

A. I believe they asked me to have them appointed trustees of that stock.

Q. In that behalf then you sought Mr. Winsor to have such a change as that made?

A. Yes, sir.

Q. And you requested him to furnish you that in writing?

A. Yes, sir.

Q. Is this the instrument that you received from him?

A. Yes, sir.

MR. HADLEY: We now offer it in evidence.

MR. EMERY: I do not think this is material or competent.

Q. I call your attention to plaintiff's exhibit No. 22:

"Seattle, Washington, May 7, 1912.

"F. P. Kellogg Lumber Company, Seattle, Washington.

"Gentlemen:

"With reference to the sale from the Columbia River Lumber Company to yourselves of certain timber property in Chelan county, and the issuance of stock in your

company, pursuant to agreements of August 23rd, 1911, wherein it was provided that stock in this company should be delivered to the Union Trust Company, of Chicago, beg to state it is satisfactory with us that the stock be delivered to the Columbia River Lumber Company, instead of the said Union Trust Co., and, in this respect, waiving no other or further conditions in said agreements of August 23rd, 1911.

"Yours very truly,

Dict. ESH. "THOMAS WINSOR."

Q. Mr. Kellogg, this letter was secured about the time that the stock was issued in the F. P. Kellogg Lumber Company, was it not?

A. Yes, sir.

Q. Along about that time, and that was to fix the disposition of the interests Winsor had in the transaction?

A. Yes, sir.

Q. Now, at the time you made this final settlement and when this last written instrument was signed in Chicago, was Mr. Winsor present, or anyone representing him?

A. No, sir.

Q. Did you or anyone else that you know of consult him with reference to that final disposition of the matter?

A. No, sir.

Q. Now, in February of 1913, when you were in Chicago, I believe that you said in October the year previous you had paid the interest on the bonds?

A. It had been paid, yes.

Q. Had been paid?

A. Yes.

Q. Was there any interest due at that time, at the time of this final settlement?

MR. EMERY: Who obtained the interest?

A. No, I think not. No interest due at that time.

Q. The interest would have been due on April first?

A. April the first and June the first, I believe, semi-annually.

Q. April first and October first?

A. Yes, October first.

Q. Did you have any funds or money on hand at that time?

A. Yes, sir.

Q. Had you defaulted in any of the conditions of that contract with them?

A. No, sir.

Q. How much money did you have on hand at that time?

MR. EMERY: I do not think we can go into that, your honor. It is immaterial and incompetent, and I object to it for that reason.

THE COURT: Let him answer.

A. My remembrance is there was something like $35,000 due from the bond sales at that time.

Q. $35,000 coming on the bond sales?

A. I believe so; about that.

Q. That is in February, at the time you surrendered this property to them?

A. I believe so; yes, sir.

By MR. EMERY:

Q. You mean they had $35,000 worth of bonds which they had to sell, is that what you mean; or do you mean they had the cash on hand?

A. Well, virtually the same thing. They had underwritten the bonds and the money was available at that time.

Q. Had they sold the bonds?

A. I don't know.

Q. Don't you know they had not sold the bonds?

A. No, I do not.

Q. Well, do you know they had cash on hand.

A. I know I couldn't get the cash.

Q. Do you know they had the cash on hand?

A. Yes, sir.

Q. You were, however, given the money?

A. By payment from Clark Poole.

Q. That is what you meant by saying they had the cash available?

A. Yes, sir.

Q. Mr. Kellogg, how much of the Kellogg Lumber Company did you own?

A. I didn't own any.

Q. Didn't own a single share?

A. Yes, sir.

Q. There was one share issued to qualify you as a director?

A. I believe so.

Q. And you immediately signed that certificate on the back and turned it over to the Columbia River Lumber Company?

A. I don't remember; I think perhaps I did.

Q. And that is all the stock you ever owned in the Kellogg Lumber Company?

A. Yes, sir.

Q. Who did own the stock?

A. The Columbia River Lumber Company owned 350,000 shares.

Q. 350,000?

A. And Clark L. Poole 100,000.

Q. Clark Poole & Company negotiated the marketing of the bonds, did they?

A. Yes, sir.

Q. And how much of a mortgage did the Columbia River Lumber Company have on its property for the Kellogg Lumber Company?

A. $250,000.

Q. In addition to that there was preferred stock issued of how much?

A. $150,000.

Q. And how much common stock?

A. $300,000.

Q. And of that common stock, Poole & Company negotiated the stock and got $100,00 for a bonus?

A. Yes, sir.

Q. And the rest the Columbia River Lumber Company got?

A. Yes, sir.

Q. And the rest of the property, free from encumbrance of the Columbia River Lumber Company, was deeded over to the Kellogg Lumber Company and then mortgaged as security for those bonds, is that it?

A. No, sir.

Q. Well, what was given as security for it.

Q. I understand there was a mortgage on that property.

Q. There was a mortgage?

A. Yes.

Q. How much of a mortgage?

A. Quite a large amount.

Q. How much?

A. I don't know.

Q. Didn't your contract provide it should be free and clear from encumbrance?

A. Yes, sir.

Q. When that deed was given was that property absolutely free from encumbrnace, and clear?

A. I don't think so.

Q. Didn't you give a warranty deed—I mean, didn't the Kellogg Lumber Company give a deed free and clear?

A. Yes, sir.

Q. Would the bonding company or the mortgage company have taken the deed was not clear?

A. No.

Q. Then, at the time it was given, it was free and clear?

A. Yes, sir.

Q. Who paid that mortgage or encumbrance?

A. I don't know who paid it.

Q. Did you pay it?

A. No, sir.

Q. Did the Kellogg Lumber Company pay it?

A. It was worked around through the transactions in some way, so I understood, that mortgage was satisfied.

Q. Now, when, that property was brought to you by Mr. Winsor, he was the man that proposed the sale to you, was he?

A. Yes, sir.

Q. Where was that?

A. In Seattle.

Q. And the purpose of it was to sell you the property?

A. Originally, yes, sir.

Q. And you were to buy the property?

A. Not originally.

Q. You were to buy the property and pay for it and have it yourself; that is the object you had in view?

A. Not originally, no, sir.

Q. Well, wasn't that the object at the time you talked with Mr. Winsor?

A. Yes, sir; that was a later deal.

Q. And you didn't have the money to pay for it?

A. No, sir.

Q. And, therefore, you were to borrow $80,000 on the property itself, and you were to organize a corporation in Washington for $225,000, and you were to turn over all that stock to the Columbia River Lumber Com-

pany, and you were given in consideration of that an option to purchase that land, weren't you?

A. Yes, sir.

Q. Did you ever exercise that option?

A. No, sir.

Q. And then, upon that option being exercised there was to be turned over to Mr. Winsor or the Union Trust Company, $10,000, or rather held for him until you paid for it and then the money was to be turned over?

A. There is a difference of opinion.

Q. Isn't that what you understand the contract means?

A. At the beginning.

Q. Isn't your understanding of that contract of August 23rd to this effect: That the Kellogg Lumber Company was to be formed, or some lumber company, under the laws of the State of Washington. The Columbia River Lumber Company was to transfer that property free and clear to this new corporation. It was then to be bonded for $80,000, capital stock was to be issued for $225,000, and that capital stock was to be placed in the Union Trust Company and you were given an option to buy it, and if you bought that stock, the company or Union Trust Company was to hold $15,000 of it for Steeves and Winsor, and when you paid for the stock they were to have the money for that—to pay the money for that stock to Steeves and Winsor?

A. I think my understanding at the time the deal was consummated was they were entitled to the stock.

Q. When that deal described in that particular instrument was consummated?

A. Yes.

Q. Now, did you ever consummate that deal; just answer frankly?

A. I think you misunderstand me. I think when the deal was consummated, as far as the deal was completed, they were to get the stock.

Q. Well, did you ever buy the property?

A. No.

Q. When that fell down you were unable to furnish the surety bond but you furnished a life insurance policy and you arranged with them to create another company under the laws of Nevada for $450,000, and mortgaged the property for $250,000, and to make the preferred stock $150,000 and $300,000 common stock, giving Poole & Company $100,000 of the common stock and giving you all the preferred stock?

A. That was the arangement.

Q. Now, did you ever exercise that option and purchase the stock?

A. No, sir.

Q. How much money did you ever pay to the Columbia River Lumber Company for their land, of your own?

A. How much did I pay of my own?

Q. Yes.

A. I never paid anything.

Q. Did you pay the interest on those bonds that you said were paid, the first year's interest, or the first term interest?

A. I didn't pay it personally.

Q. Did it come out of your pocket?

A. No, sir.

Q. Who paid it?

A. I think Clark Poole & Company.

Q. They were the persons who had the selling of the bonds?

A. Yes, sir.

Q. Did you pay any premium on the $50,000 insurance policy which you turned over to the company?

A. Yes, sir.

Q. How much did you pay for it?

A. I have forgotten the amount of the premium.

Q. Wasn't it $400?

A. Substantially that.

Q. That was one year's premium?

A. Yes, sir.

Q. You never paid any other premium?

A. No, sir.

Q. The policy lapsed?

A. Yes, sir.

Q. Were you, at the time these negotiations were taken up, able to comply with the terms and conditions of that agreement of August 23rd. You were to furnish $50,000 surety bond and organize a company in accordance with that contract?

A. At what time?

Q. At the time that contract was made, August 23rd, 1911?

A. No. It became impossible for me to get this bond; never got a bond.

Q. Did Mr. Winsor assign to you or agree to assign to you any part of his alleged commission?

A. Yes, sir.

Q. When did he make that agreement?

A. At the time these negotiations were pending.

Q. Which negotiations, before August 23rd, before that contract of August 23rd was made?

A. Yes, sir.

Q. How did he come to make that agreement with you?

A. The original agreement that I made with Mr. Winsor was not for a bonding proposition, but was for the sale of the property.

Q. But you were unable to carry that out?

A. Sir?

Q. That was never put in writing and carried out?

A. No; I went to Chicago and framed up this bond deal.

Q. When was the agreement made to assign you one-half of the $5,000?

A. It was made at the time I came back with the bond proposal.

Q. And before it was consummated?

A. Before it was cash.

Q. Well, has that agreement ever been pledged?

A. No, sir.

Q. You claim to be the owner of one-half of that $10,000 Mr. Shields is suing for?

A. There is a misunderstanding about that.

Q. You claim to be the owner of one-half of that?

A. Yes, sir.

Q. You were to get a commission of $5,000 for buying the property yourself, weren't you?

A. Yes, sir.

MR. EMERY: I think that is all at this time.

Re-Direct Examination.

By MR. HADLEY:

Q. You testified a moment ago that the policy lapsed and you paid only one premium; what was the reason the policy lapsed?

A. I had never severed my connection with the Company.

Q. Do you remember when you took that policy out?

A. About the time this deal was consummated.

Q. Was that policy paid up to a time later, at the time you signed this last waiver?

A. Yes, sir.

Q. Mr. Kellogg, you testified a moment ago you didn't pay the interest on those bonds; you thought Clark Poole paid it; did they pay it out of the money derived out of the bond issue?

MR. EMERY: I object, unless he knows, as being incompetent.

A. They paid it out of the proceeds from the bond sales.

Q. (By MR. EMERY.) How do you know?

A. Because it was a matter of record on the books.

MR. EMERY: If it is a matter of record on the

books, I ask that the books be produced and the testimony stricken and ask that the jury be instructed to disregard it.

Q. Do you know it from any other source than that source? How did it come to be on your books. Did you put it on?

A. Yes, sir.

Q. How do you know they paid it out of the bond?

A. From correspondence with Poole & Company.

Q. And have you any correspondence with Poole & Company?

A. No, sir.

MR. EMERY: We will admit they paid it from the proceeds of the bond, if that is what you want to show.

MR. HADLEY: That is what we want to show.

MR. EMERY: We paid it out of our property.

Q. Mr. Kellogg, did you have any talk with Mr. Selover, or any of them, before you signed this agreement about your surrendering all that property?

MR. EMERY: Oh, I object to that as being incompetent. The agreement, if any, was reduced to writing, and is the best evidence.

THE COURT: He may answer.

A. Yes, sir.

Q. What was it?

MR. EMERY: That is objected to as being incompetent.

THE COURT: He may answer.

A. We had a great deal of correspondence and personal talks in regard to the conduct of the property from

time to time. Statements were rendered and we were in touch on all those matters.

Q. What, if anything, was said about the throwing up of this, turning back of this property, or the option on that stuff; whether or not you should receive anything out of it?

A. Whether I was to receive what?

Q. Receive anything?

A. Yes, sir.

Q. You say they were going to sell it?

A. Yes, sir; I was to receive $10,000.

MR. EMERY: There wasn't any agreement of that sort in writing; neither is it pleaded; neither is it material in this action.

THE COURT: Objection sustained.

MR. EMERY: And I ask that the answer be stricken.

THE COURT: Proceed.

Re-Cross-Examination.

By MR. EMERY:

Q. From the time this agreement was entered into you became the manager of the corporation?

A. Yes, sir.

Q. And you were the person who built the dams and cribs and did the work as manager, under your supervision?

A. Yes, sir.

Q. You paid them as manager of the Kellogg Lumber Company?

A. Yes, sir.

Q. Did you receive a salary as manager of the Company?

A. Yes, sir.

Q. And it was always paid in full, wasn't it?

A. Yes, sir.

Re-Redirect Examination.

By MR. HADLEY:

Q. Under the agreement of August 23rd, 1911, you were to receive a salary as manager?

A. Yes, sir.

Q. You were at all times to receive it?

A. Yes, sir.

THE COURT: The agreement shows that.

(Witness excused.)

THOMAS WINSOR, recalled as a witness on behalf of the Plaintiff, being already sworn, testified on oath, as follows:

Direct Examination.

By MR. THOMPSON:

Q. Mr. Winsor, you have heard the testimony just given by Mr. Kellogg, did you?

A. Yes, sir.

Q. With reference to the deal, particularly that he made which was called the waiver deal down at Chicago, by which he released his rights under the original contract. You heard his testimony with regard to that?

A. Yes, sir.

Q. I will ask you what you know about any such agreement as that being made?

MR. EMERY: I object to that as being immaterial.

THE COURT: He may answer.

MR. EMERY: Note an exception.

A. I knew nothing about it.

Q. When did you first find out any such thing had been done?

MR. EMERY: That is objected to as being immaterial.

THE COURT: He may answer.

A. Yesterday.

Cross-Examination.

By MR. EMERY:

Q. You testified to having cruised this timber, I believe?

A. Yes, sir.

Q. Are you a cruiser?

A. Yes, sir.

Q. How long have you followed that business?

A. Pretty near all my life; ever since my teens.

Q. You have lived in Seattle a long time?

A. 27 years.

Q. Are you the same Thomas Winsor who formerly managed and controlled and run the Detroit Hotel on Occidental Avenue?

A. Yes, sir.

Q. Were you arrested in connection with running that hotel?

A. Yes.

Q. As a disorderly house?

A. Yes.

Q. When was that?

A. 1904 or 1905.

Q. Were you convicted?

A. No, sir.

Q. Did you plead guilty?

A. No, sir.

Q. Was the case ever tried?

A. No, sir; the prosecution would not come into court and try the case, and the court struck it from the calendar.

Q. You continued to manage the house after that?

A. Yes, sir. That is the only time I was ever arrested in my life.

Q. A large number of other persons were arrested from the same house?

A. I believe my son was arrested with me.

MR. EMERY: That is all.

THE WITNESS: I would like to explain that transaction.

MR. EMERY: All right. Do all the explaining you wish.

THE COURT: I do not think it is material.

THE WITNESS: Two officers were trespassers in my house and I ordered them out and one of them struck me, and my son knocked one of them down, hit one of them in the stomach, and he doubled up, and I jumped on him, and he hit the other in the mouth and downed him, and they had us arrested for assault and battery.

THE COURT: The jury is instructed to eliminate this examination with reference to the hotel.

THE WITNESS: It is an infamous lie if anybody said I ran a disorderly house.

MR. EMERY: I was so informed, and I wanted to be informed correctly.

(Whereupon the jury was duly admonished by the court, and an adjournment was taken until to-morrow morning at ten o'clock.)

WEDNESDAY, JULY 22nd, 1914. *TEN A. M. SESSION*

THE COURT: Both sides concede the jurors are present?

MR. EMERY: We do, your honor.

MR. THOMPSON: We will rest.

MR. EMERY: I wish to call Mr. Kellogg for one or two questions on cross-examination before they rest. I have two telegrams, one by Mr. Clark and one of Mr. Kellogg in reply. I wish to introduce them as part of the cross-examination.

THE COURT: Proceed.

MR. EMERY: Very well; I understand.

At this time the defendant moves the court to instruct the jury to find a verdict for the defendant on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action.

THE COURT: Does the defendant rest, likewise?

MR. EMERY: I understand we have a right to make this motion before we rest and challenge the sufficiency of the evidence.

THE COURT: You may make a motion for a nonsuit.

MR. EMERY: Well; very well; I will at this time then move the court to non-suit the plaintiff on the ground that he has failed to prove facts sufficient to constitute a cause of action. The plaintiff has confirmed the evidence that he has no right to a commission in this case; no contract which he could enforce for a commission. I assume the plaintiff is Thomas Winsor. The action is brought in the name of Mr. Shields; for what reason I do not know.

THE COURT: Shall I excuse the jury?

MR. EMERY: It is immaterial, your honor. If counsel would like to have the jury excused, I have no objection.

THE COURT: (To the jury.) You may be excused.

(Jury retires.)

MR. EMERY: The plaintiff brought this action in the first instance to recover a commission under the contract, exhibit A, which is set out in the amended complaint, but counsel eventually discovered by the decisions of our Supreme Court on the question of fraud, that such an action could not be maintained, and, therefore, applied for leave to amend his complaint, and set up an entirely different cause of action, to-wit: a cause of conversion under the contract.

(Counsel for defendant continues argument on motion which is replied to by counsel for plaintiff, and closing argument is made by counsel for defendant.)

THE COURT: From the testimony, the plaintiff's right of recovery in this case must be predicated upon the agreement which bears date of August 23rd, 1911.

This agreement makes another memoranda of even date, executed between the defendant company in this case, and F. P. Kellogg, a part of it, by reference thereto. I think the recitals in the agreement in which the plaintiff in this case, or his assignor, Mr. Thomas Winsor, was a party, would take the case out of the statute of frauds as defined by the Legislature of Washington, where it is provided in substance that any contract for the sale of real estate or any agreement, contract or promise with reference thereto shall be void unless such agreement or promise or some note or memoranda thereof be in writing or signed by the party to be charged, or by some person thereunto lawfully authorized. That is to say, it refers to paragraph 5 of the section of the act where it provides that an agreement authorizing an agent or broker to sell or purchase real estate upon compensation or commission, and then provides what shall be set out in the authorization before it can support an action for a commission. This contract here pre-supposes a consummation, a consummated arrangement that all of the acts defined there have been, so far as the testimony is concerned, carried out, and the contract is really an executed one, and the contract said the stock has been issued pursuant to the arrangement between the parties, and that this stock has been converted to the use of the defendant. The memoranda entered into between Kellogg and the defendant company recites what shall be done in the organization of the corporation which was contemplaed and likewise provides for the payment to the defendant of the consideration for the land in issue here. It provides for

compensations that were to be paid to Mr. Kellogg for his work in the operation and management of the concern that was to be organized and which was to handle the output from the land of the defendant company until it became the property of Mr. Kellogg. The testimony shows that Mr. Kellogg did not pay anything himself for this property. It shows further, and it is conceded that the terms and conditions of that agreement were not carried out. They were abandoned and a new plan was adopted by the parties afterwards.

I do not think that that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and, if the plan which was adopted was substantially the same as the original plans, the plaintiff in this case would be entitled to his compensation, if he was the agency which brought the parties together, and if the parties carried out the agreement which was entered into as understood by the parties.

Now, when I read this memoranda that was signed by all these parties, there is one thing that immediately challenges my attention, and that is the pen interlineation made. In the minds of the parties there was something originally omitted from the memoranda, and which was before the minds of the parties at the time, and it was a matter which was considered very material at the time, and that is this insertion after the word "agreed," following the words, "The Columbia River Lumber Company has agreed." Then follows this insertion, "In the event of said Kellogg's carrying out completely the said proposed sale," and then the writing as originally pre-

pared continues, "to pay as a commission for perfecting said sale the sum of $15,000," and then follows the interlineation again, "In manner and form following," and then follows the way and manner in which this shall be paid, and provides for the depositing of the stock of the Company in the Union Trust Company to be held for the use—

MR. EMERY: For the benefit.

THE COURT: For the benefit of Winsor and likewise for the benefit of R. H. Steeves; $10,000 for Winsor, and $5,000 for Steeves. Now, then, this stock was not to be paid to these parties. If it had been considered they were entitled to anything at that time, the stock would have been delivered to the parties instead of putting it in the Union Trust Company. But there was still something to follow, and what was to follow was simply what is interlined there, the carrying out of the proposed sale by the payment of the money, and then the Union Trust Company was authorized to pay to these parties, not the stock, but the money, when it was paid by Kellogg. Now, then, in the memoranda that was made by Winsor, on May 7th, 1912, he says that he is willing that the Columbia River Lumber Company shall hold the stock instead of the Union Trust Company, and, therefore, the testimony shows here, I conclude that the Columbia River Lumber Company has this stock and is still holding it, and Mr. Kellogg has stated he hasn't paid anything and he can't pay anything; that he has abandoned the property; that he was short of funds in the operation of the concern, and needed more funds, and the parties declined

to advance him more funds, and that then it was concluded that he better surrender all of the property, which he did, and did not receive anything for it, never received a cent for it; never put in a cent and never got a cent out, except he was paid the compensation provided for in this agreement. Now, then, much emphasis has been placed upon the fact that this Company was called the Kellogg Company, and the land was sold to the Kellogg Lumber Company, which is carrying out the original plan. Now, the testimony does not appear to bear out that construction. The only fact that could possibly suggest such a conclusion is the fact that it is now the Kellogg Lumber Company. It would be immaterial whether this Company was the Kellogg Lumber Company or another lumber company. The rights of the plaintiff would not be any greater than if it was called the Thompson Lumber Company—

MR. EMERY: Or Selover Lumber Company.

THE COURT: Yes, or Thompson Lumber Company, or anything else, because the defendant company owns all of the stock. It even owns the one share given to Mr. Kellogg to qualify him to act as the trustee. He says the stock was issued to him and he endorsed it and delivered it back to the company.

Now, I could not instruct the jury upon any proposition of law known to me which would authorize a recovery in this case. It would simply be authorizing the plaintiff to recover in this case because the defendant organized or permitted to be organized or permitted the organization of a company to hold these properties and

appointing Mr. Kellogg to manage and operate the concern, and paying for it, and giving him the opportunity of buying the preferred stock of the concern, and that would be all. Defendant company still owns all of the property, the same as it did before, except it holds it in another form or name. I do not think, under the evidence in this case, that the plaintiff is entitled to anything. I appreciate the plaintiff has done much service, but the court cannot make contracts. Here is a contract that is definite and clear, and while there might have been some doubt as to its meaning, the direct expression is inserted by pen, which says, when these matters shall be paid and shall be paid only on the completion and carrying out of the plan or arrangement. I think the motion must be granted. You may call in the jury.

(Whereupon the jury returns to box.)

THE COURT: I might add that I think the Bishop case, in the 17th Washington, is clearly distinguishable from the facts in this case. There the parties made a sale, and the buyer paid a part of the consideration himself, and entered into the operation of the property, and made the payments from the output of the mine, as the ywere made, and, afterwards, the parties agreed upon another disposition for a valuable consideration, which was satisfactory to both, wherein the money was paid and passed between the parties themselves, rather than through the bank, and the court rightly held in that case that the parties could not in that sort of fashion defeat the party from receiving consideration for services rendered. But this case is entirely different in that

the defendants here still have the property, always have had the property, but only in another form; always had the management of it, and always had all of the stock.

(To the jury.) You, gentlemen of the jury, are instructed that the defendant, having moved for non-suit in this case, upon the ground there is no sufficient evidence on which to predicate a verdict, the court has granted the motion. There is no evidence in this case, as I construe the law, that could support a verdict for any sum, and you are therefore excused from further consideration of this case, and until ten o'clock tomorrow morning.

MR. THOMPSON: We except, of course, to the ruling of the court, and I think counsel will agree to a short form of order.

THE COURT: The proper form would be on motion for a new trial.

MR. THOMPSON: Yes, we will come in this afternoon.

MR. EMERY: It will be impossible for me to be here this afternoon, your honor.

State of Washington, County of King, ss.

I, JEREMIAH NETERER, Judge of the District Court of the State of Washington, in and for the Northern District, Western Divisions, being the Judge before whom the above entitled cause was tried, do hereby certify,

That the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings which occurred in said cause, and the same are hereby made a part of the record herein.

I do further certify that the same contains all of the material facts, matters and proceedings heretofore occurring in said cause, and upon the trial thereof, and not already a part of the record in said cause.

I do further certify that the foregoing Bill of Exceptions contains all of the evidence and testimony introduced on the trial of said cause, together with all objections and exceptions, made and taken to the admission or exclusion of testimony, and all motions, offers to prove, and admissions and rulings thereon; and that plaintiff's exhibits, numbered from 1 to 22 inclusive, are to be and are hereby attached, and are all the exhibits introduced upon the trial of said cause, and said exhibits numbered 1 to 22 inclusive, are ordered to be hereto attached, and they are by this order made a part of this Bill of Exceptions.

Counsel for plaintiff and defendant being present and concurring.

Done in open court this 12th day of September, 1914.

JEREMIAH NETERER,
Judge.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 14, 1914. Frank L. Crosby, Clerk. By Deputy.

United States District Court, Western Division of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
F. P. KELLOGG,
Intervenor.
No. 2527

ASSIGNMENT OF ERRORS.

Now comes Thomas M. Shields, plaintiff in the above entitled cause, and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, which appeal from this Honorable Court was made on the 24th day of December, 1914.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the motion of the defendant for non-suit and for the dismissal of the cause over the objection and exception of the plaintiff, and for granting the order and judgment of dismissal of the said cause.

II.

That the said United States District Court for the Western District of Washington, Northern Division, erred in overruling the plaintiff's motion for a new trial of said cause.

Wherefore, this plaintiff prays that said judgment be reversed, and that said District Court for the Western District of Washington, Northern Division, be ordered

to enter a decree reversing the decision of the lower court in said cause.

EDGAR S. HADLEY,
WILL H. THOMPSON,
Attorneys for Plaintiff in Error.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 24, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
F. P. KELLOGG, *Intervenor.*
No. 2527

PETITION FOR WRIT OF ERROR.

Comes now Thomas M. Shields, the plaintiff in the above entitled action, and respectfully petitions this Honorable Court and the Honorable Jeremiah Neterer, Judge of said Court, for a writ of error in said cause to the United States Circuit Court of Appeals, Ninth Circuit, hereby respectfully showing to the Court and the said District Judge, that the above named Thomas M. Shields, feeling aggrieved by the judgment of dismissal rendered and entered in the above entitled cause on the 23rd day of July, 1914, desires to transfer said cause on said writ of error to the Circuit Court of Appeals for said Ninth

Circuit, for the reasons set forth in the assignment of errors filed herewith, which said assignment of error embraces the following:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the motion of defendant for non-suit and for the dismissal of the cause over the objection and exception of the plaintiff and for granting order and judgment of dismissal of said cause.

2. That said United States District Court for the Western District of Washington, Northern Division, erred in overruling plaintiff's motion for a new trial of said cause.

He prays that said Writ of Error be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings upon which this decree is based, duly authenticated, be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at Seattle, Washington, under the rules of such court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required of him be made.

THOMAS SHIELDS,
Plaintiff.
EDGAR S. HADLEY and
WILL H. THOMPSON,
Attorneys for Plaintiff.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff.

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.

F. P. KELLOGG,
Intervenor.

No. 2527

ORDER ALLOWING WRIT OF ERROR.

This 22nd day of January, 1915, comes plaintiff by his attorneys, and files herein and presents to the court his petition and praying for the allowance of a writ of error to the United States Circuit Court of Appeals, Ninth Judicial Circuit, an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Apeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon plaintiff's giving a bond, according to law, in the sum of $400.

JEREMIAH NETERER,

Judge of the U. S. District Court, Western District of Washington, Northern Division.

Indorsed: Order allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
F. P. KELLOGG,
Interrenor.
No. 2527

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Thomas Shields, as principal, and Philip Winsor, W. C. Casler and Luella Casler, as sureties, of Seattle, State of Washington, are held and firmly bound unto the Columbia River Lumber Company, a corporation, in the sum of Four Hundred Dollars ($400.00), lawful money of the United States, to be paid to the said Columbia River Lumber Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 21st day of January, 1915.

Whereas the above named Thomas M. Shields has prosecuted a writ of error to the United States Circuit Court or Appeals, Ninth Circuit, to reverse the judgment of the District Court for the Western Division of Washington, Northern Division, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Thomas Shields shall prose-

cute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

THOMAS SHIELDS,
PHILIP WINSOR,
C. W. CASLER,
LUELLA CASLER.

State of Washington, County of King, ss.

On the 21st day of January, 1915, personally appeared before me Philip Winsor, C. W. Casler and Luella Casler, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Philip Winsor, Luella Casler and C. W. Casler being respectively by me duly sworn, says, each for himself, and not one for the other, that he is a resident of said County of King, State of Washington, and that he is worth the sum of $400.00 over and above his just debts and legal liability and property exempt from execution.

THOMAS SHIELDS,
PHILIP WINSOR,
C. W. CASLER,
LUELLA CASLER,

Subscribed and sworn to before me this 21st day of January, A. D. 1915.

R. W. GROVER,

Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

This bond is approved both as to sufficiency and form this 22d day of January, 1915.

JEREMIAH NETERER,
Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
F. P. KELLOGG,
Intervenor.
No. 2527

ORDER.

It appearing by the stipulation that the parties to this action on appeal have agreed that the exhibits shall be forwarded to the Circuit Court of Appeals, Ninth Judicial Circuit, in connection with the transcript of record.

It is now therefore ordered and the Clerk is hereby directed to forward to the Circuit Court of Appeals, Ninth Judicial Circuit, in this action, all exhibits therein along with the transcript of record.

Done this 22nd day of January, A. D. 1915, at Seattle, Washington.

JEREMIAH NETERER,
United States District Judge for the Western District of Washington, Northern Division.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.* } No. 2527

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO ORIGINAL EXHIBITS.

United States of America,
Western District of Washington, } ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the original exhibits introduced and used upon the hearing and trial of the above entitled cause, as follows: Plaintiff's Exhibits 1, 2, 3, 4. 5. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the transcript of the record on appeal in the above entitled cause; which said exhibits are so transmitted pursuant to the order of the said District Court, so directing, a copy of which said order will be found on page 173 of the record on appeal in said above entitled cause.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 13th day of March, 1915.

FRANK L. CROSBY,

(Seal.)

Clerk.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS,
Plaintiff.
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
No. 2527

ORDER ENLARGING TIME TO TRANSMIT RECORD.

Now, on this 23d day of January, 1915, upon motion of attorneys for plaintiff, and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 22d day of March, 1915.

JEREMIAH NETERER,
District Judge.

Indorsed: Order Enlarging Time to Transmit Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

THOMAS H. SHIELDS, *Plaintiff*,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
F. P. KELLOGG, *Intervenor.*
No. 2527

WRIT OF ERROR.

United States of America, Ninth Judicial Circuit, ss.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Circuit Court before you, or some of you, between Thomas Shields, plaintiff in error, and the Columbia River Lumber Company, defendant in error, a manifest error hath happened to the great damage of the said Thomas Shields, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said circuit, within thirty (30) days from the date hereof, in said Circuit

Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable E. D. White, Chief Justice of the United States, this 21st day of January, 1915.

Attest:

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

(Seal.)

By ED M. LAKIN, Deputy.

Indorsed: (Copy.) No. 2527. In the District Court of the United States for the Western District of Washington, Northern Division. Thomas Shields, plaintiff, vs. Columbia River Lbr. Co., defendant. F. P. Kellogg, intervenor. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff.*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
F. P. KELLOGG, *Intervenor.*
No. 2527

CITATION.

U. S. of America, ss.

The President of the United States to the Columbia River Lumber Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date hereof pursuant to an order allowing a writ of error, and the writ of error duly issued and now on file in the office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Thomas Shields is plaintiff in error and you are defendant in error, and show cause, if any there be, why the judgment entered against said plaintiff in error, as in said order allowing writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, this 22d day of January, 1915, and of

the Independence of the United States the one hundred and thirty-eighth.

(Seal.) JEREMIAH NETERER,

United States District Judge for the Western District of Washington, Northern Division.

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 22d day of Jany., 1915.

GEO. D. EMERY,

Attorney for Defendant.

Indorsed: (Copy) No. 2527. In the District Court of the United States, for the Western District of Washington, Northern Division. Thomas Shields, Plaitniff, vs. Columbia River Lbr. Co., Defendant. F. P. Kellogg, Intervenor. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff,*

vs.

COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*

F. P. KELLOGG, *Intervenor.*

No. 2527

ACKNOWLEDGMENT OF SERVICE.

This is to certify that I have this day received of Edgar S. Hadley, one of the attorneys for the plaintiff in error in the above entitled cause, a copy of the writ

of error and petition therefor, assignment of error and citation in error.

GEO. D. EMERY,
Attorney for the Defendant.

Indorsed: Acknowledgment of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

THOMAS H. SHIELDS,
Plaintiff,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant.
F. P. KELLOGG,
Intervenor.
No. 2527

STIPULATION.

It is hereby stipulated by and between counsel for plaintiff in error and counsel for defendant in error that there shall be embraced in the printed records the following matters:

1. Amended Complaint.
2. Answer of Columbia River Lumber Co.
3. Reply thereto.
3-a. Stipulation that F. P. Kellogg may dismiss his Complaint.
3-b. Order of Dismissal.
4. Impaneling of Jury.
5. Motion for Non-Suit.

6. Ruling thereon by the Court.
7. Opinion of the Court.
8. Motion for New Trial.
9. Order Overruling New Trial.
10. Judgment of Dismissal.
10-a. Stipulation Extending Time to Prepare Bill of Exceptions.
10-b. Order Allowing Extension of Time.
10-c. Stipulation Extension of Time to Prepare Bill of Exceptions.
10-d. Order Allowing Extension of Time.
11. Bill of Exceptions.
12. Assignment of Error.
13. Petition for Writ of Error.
14. Allowance of Writ of Error.
15. Writ of Eror.
16. Citation in Error.
17. Bond and Approval.
18. Acceptance of Service of Copy of Writ of Error, Petition Therefor, Assignment of Error.
19. This Stipulation.
20. Clerk's Certificate.
21. All Exhibits are to be lodged in the Circuit Court of Appeals, 9th Dist., with the transcript of record.
22. Order Dismissing Complaint in Intervention.
23. Order to Send Up Original Exxhibits.

It is understood by counsel that by this stipulation counsel for defendant does not waive any right that he may have to object to this appeal.

Dated at Seattle, Washington, this 22nd day of January, 1915.

EDGAR S. HADLEY and
WILL. H. THOMPSON,
Attorneys for Plaintiff.

GEO. D. EMERY,
Attorney for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 22, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THOMAS M. SHIELDS, *Plaintiff.*
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant.*
No. 2527

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America
Western District of Washington } ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 182 printed pages, numbered from 1 to 182 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Ap-

peals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return of said Writ of Eror herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 454 folios at 15c	$ 68.10
Certificate of Clerk to Transcript of Record—4 folios at 15c	.60
Seal to said Certificate	.20
Certificate of Clerk to Original Exhibits—3 folios at 15c	.45
Seal to said Certificate	.20
Statement of cost of printing said transcript of record, collected and paid	154.40
Total	$223.95

I hereby certify that the above cost for preparing and certifying record, amounting to $223.95, has been paid to me by Messrs. Edgar S. Hadley and Will H. Thompson, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 13th day of March, 1915.

(Seal.) FRANK L. CROSBY, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS M. SHIELDS, *Plaintiff in Error,* *vs.* COLUMBIA RIVER LUMBER COMPANY, a Corporation, *Defendant in Error.*	No. 2585.

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, Judge.

Opening Brief of Plaintiff in Error

EDGAR S. HADLEY,

WILL. H. THOMPSON,

Attorneys for Plaintiff in Error.

304 Pioneer Building, Seattle, Washington.

Central Publishing Co., Printers, Seattle

Filed

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS M. SHIELDS,
Plaintiff in Error,
vs.
COLUMBIA RIVER LUMBER COMPANY, a Corporation,
Defendant in Error.

No. 2585.

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, Judge.

Opening Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This action was commenced by the plaintiff in error as assignee of the claim of one Thomas Winsor against the defendant in error in the Superior Court of the State of Washington in and for the County of King, and was later transferred to the United States District Court, Western District of Washington, Northern Division, at Seattle, Washington.

The plaintiff in error by this suit sought to recover a judgment against the defendant in error, Columbia River Lumber Company, in the sum of

$10,000 and interest on account of conversion of certain stock.

Prior to the 23rd day of August, 1911, Thomas Winsor, who was the assignor of the claim sued upon, was employed by a selling committee of the defendant in error for the sale of their timber land situated in Chelan County, Washington, (See plaintiff in error's Exhibit No. 12, Record p. 63), and in the course of his efforts secured as a prospective purchaser one F. P. Kellogg.

On the 23rd day of August, 1911, an optional agreement was entered into between F. P. Kellogg and the defendant in error for the sale to Kellogg of the timber lands belonging to the defendant in error above referred to. This agreement is plaintiff in error's Exhibit No. 14, Tr. R. p. 67.

Recognizing the services of the plaintiff in error's assignor, Thomas Winsor, "in negotiating and effecting a sale of said property" an agreement was executed by the defendant in error and the said Thomas Winsor wherein the amount of said Thomas Winsor's compensation as broker was fixed at $10,000 (Plaintiff in error's Exhibit No. 13, Tr. R. p. 64), which compensation was taken in stock in a corporation to be organized by Kellogg.

Thereafter, on the 29th day of November, 1911, the said Kellogg fully exercising the option con-

tained in plaintiff in error's Exhibit No. 14, (Tr. R. p. 67), entered into a contract with the defendant in error, which contract and instrument is designated as plaintiff in error's Exhibit No. 20, as set forth in the record at page 122, whereby he became purchaser of the property of the defendant in error which conditions were thereafter fully carried out by Kellogg. Afterwards, the defendant in error desiring itself to become custodian of the stock, instead of leaving it in the hands of the Union Trust Company of Chicago, as was agreed in the agreement with plaintiff's assignor above referred to, requested Thomas Winsor to consent thereto, which change was consented to by Winsor, (Tr. R. pp. 140, 141, and 142). Thereafter defendant in error and Kellogg, without the knowledge, information or consent of Winsor, agreed to and did abandon all the terms and conditions of the sale of the property of the defendant in error whereby said Kellogg abandoned all right to redeem or purchase the whole or any portion of the stock of the Kellogg Lumber Company. The defendant in error thereafter denied the right of said Thomas Winsor to said stock, or any interest therein, and converted all of said stock to its own use. Thomas Winsor, after demanding the right to said stock, duly assigned his right and claim against the defendant in error to the plaintiff

in error, whereupon this action was brought to recover the sum of $10,000 with interest thereon.

At the close of plaintiff in error's testimony, upon motion of defendant in error, a non-suit was granted.

SPECIFICATIONS AND ASSIGNMENT OF ERRORS

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the motion of defendant for a non-suit and for the dismissal of the cause over the objection of the plaintiff and for entering judgment thereon.

II.

That the United States District Court for the Western District of Washington, Northern Division, erred in overruling plaintiff's motion for a new trial.

ARGUMENT.

The ruling made by the Honorable Trial Court sustaining the motion for non-suit, and the ruling made in denying the appellant's motion for a new trial, though separately assigned for error, will be here treated together, for if the action of the court

in sustaining the motion of the defendant in error for a non-suit was correct, then the action of the court in denying the motion for a new trial was also correct. Each ruling was based upon the construction given by the court to the terms and conditions contained in Exhibit No. 13 introduced in evidence by the plaintiff in error. If that construction is correct the judgment should be affirmed; if incorrect, the judgment should be reversed. This issue is narrow and if it be held by this court, in accordance with our contention, that the ruling of the District Court was erroneous, then, upon reversal, the order of this court should be that judgment be entered by the district court in favor of the plaintiff in error for the sum of $10,000 principal, together with lawful interest from the time of the conversion by the defendant in error of the stock held by the defendant in error for the benefit of the assignor of plaintiff in error.

II.

By reference to the opinion of the court, to be found in the transcript at pages 159 to 166 inclusive, it will be seen that the court finds that the plaintiff in error sustained the allegations of his complaint by the testimony, and was entitled to recover, *except for one reason*, and that was that the court held that the written instrument, (Plaintiff's Exhibit

No. 13), not only required that Thomas Winsor (the plaintiff's assignor) should have produced a purchaser ready and willing to buy the property of the defendant in error, and should cause such purchaser to enter into the form and character of contract provided by the defendant in error, but should thereafter *become a guarantor* for the faithful performance of all the terms and conditions of that contract upon the part of the plaintiff in error's assignor, and should not be entitled to receive his compensation as a broker for his services in procuring the purchaser until that purchaser had fully carried out the terms of the purchase through the five years during which the purchase money should be from time to time paid; and if the whole of such purchase money was not finally paid the broker should receive nothing. In other words, the contention of the defendant in error, which the court by the order of non-suit sustained, was and is that although the broker, Thomas Winsor, furnished the purchaser, brought the parties together, induced them to enter into the written instrument heretofore referred to, and although the defendant in error accepted the fruits of his labor and accepted his purchaser and sold to that purchaser the property in controversy for a sum and upon conditions satisfactory to such purchaser and said defendant in error, and that said purchaser took possession of the property, expended many

thousands of dollars in improvements thereon, built a mill-dam upon the Entiat River and a large mill thereat, and cut and rafted about seven million feet of timber to said mill, that still the broker Winsor (assignor of plaintiff in error) was not yet entitled to his commission, but that that commission must abide the final result of this sale, and to depend entirely upon whether the purchaser eventually complied with all the terms and conditions of said sale. This view of the instrument construed we feel to be unquestionably erroneous. Not only upon a mere reading of the instrument itself, but plainly in the light of all the testimony in the cause. Of course in the determination by the court as to the true meaning of the instrument in question, the situation of the parties, their relation to each other, the preceding steps taken by the parties, were proper for the consideration of the court in determining what the parties intended by the language used. Without discussion let us rapidly refer to the steps theretofore taken which brought about the execution of the instrument in question. On the 3rd day of July, 1911, the Columbia River Lumber Company, defendant in error, by written instrument (Plaintiff's Exhibit No. 12, Record p. 63) employed Thomas Winsor (plaintiff in error's assignor) to sell the timber land referred to in this controversy. Thomas Winsor made a thorough scale of

the timber involving a labor of more than sixty days, (Record p. 74 to p. 97 inclusive, and p. 156), and, as the court in its opinion concedes, performed his part of his contract, unless he was obligated to see that his principal throughout the five years within which the contract was to run should carry out all the terms and conditions thereof. The court in its opinion holds that the plaintiff's assignor, Thomas Winsor, brought the parties together, and they entered into a written contract between them for the sale of this land, and while they varied in the terms and conditions of that contract somewhat from those first agreed upon and adopted somewhat a new plan, yet said the court:

"I do not think that that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and, if the plan which was adopted was substantially the same as the original plans, the plaintiff in this case would be entitled to his compensation, if he was the agency which brought the parties together, and if the party carried out the agreement which was entered into as understood by the parties."

So that it will be seen that Thomas Winsor, the plaintiff in error's assignor, performed his whole duty as a broker in bringing the purchaser to the defendant in error and the purchaser and the de-

fendant in error made between them satisfactory terms and conditions of a purchase and sale of the property.

Again referring to plaintiff's Exhibit No. 13 (Record p. 64), it will be seen that it is therein specifically acknowledged, over the signature of the Columbia River Lumber Company, that the $10,000 for which Thomas M. Shields (plaintiff in error), as the assignee of Thomas Winsor, brings this suit, is a definite sum to be paid "as a commission" for perfecting said "*sale.*"

Originally, as appears by the testimony of Thomas Winsor, this $10,000 was to be paid in cash, but when the defendant in error and the purchaser closed their contract, such variations had been made between them as to some of the conditions; the purchaser desiring to have all the stock of the corporation placed in escrow to be taken up by such purchaser from time to time at par plus 6 per cent. annual interest, it was arranged that the said Thomas Winsor, instead of receiving cash, should have $10,000 of the stock of said company in lieu thereof, and by the terms of plaintiff's exhibit No. 13, that all the stock of the defendant corporation should be placed in the hands of the Union Trust Company of Chicago, Illinois, to be held in escrow so that the purchaser might at all

times have the opportunity to take up said stock at par plus 6 per cent. annual interest, and that said Union Trust Company

> "are hereby requested and directed that when the certificates of stock mentioned in said agreement are delivered to you by F. P. Kellogg, or his assigns, for the benefit of the Columbia River Lumber Company, *to set over and hold for the benefit of Thomas Winsor $10,000 worth of said certificates.*"

Here was a setting apart and devotion of $10,000 worth of this stock for the benefit of Thomas Winsor, for what? The instrument answers that question:

> "To cover all the claim or claims of the said Thomas Winsor * * * against any of the parties to said transaction on account of commissions for the negotiating and completing the *sale of said property.*"

Our contention is that this stock then and there became the property of Thomas Winsor, and the court in construing the contract plainly would have upheld our view to that effect except for the opinion that certain words in that instrument indicate that this stock was dependent upon the purchaser's *eventually making good all the terms of his contract.* These words upon which the court lays stress are as follows:

> "Now, therefore, in consideration of the services rendered by Thomas Winsor * * * * *in negotiating and effecting a sale of said property*, the Columbia River Lumber Co. have agreed in event of said Kellogg's carrying out completely *the said proposed sale*, to pay as a commission for *perfecting said sale* the said sum," etc.

It will be noted that the *sale* had not yet been made; the conditions had been proposed and a tentative agreement had been made by another instrument referred to in this exhibit. That reference is as follows (Record p. 64):

> "Reference is hereby made to an agreement dated August 23rd, 1911, between the Columbia River Lumber Company and F. P. Kellogg wherein the Columbia River Lumber Company have upon the terms in said agreement mentioned, agreed to sell to F. P. Kellogg certain property located in Chelan County, Washington, for the agreed price of $225,000; also a certain escrow agreement dated August 23, 1911; directed to you as escrow agent providing for a payment by Kellogg, or his assigns, a corporation to be organized, as is provided in the agreement above mentioned, to you as escrow agent for the benefit of the Columbia River Lumber Co., $225,000, the purchase price of said property. Reference is made to the above two agreements the same as if the terms of said agreement were here set out in full."

Referring now to the agreement for the sale of the property mentioned as of date August 23, 1911, which appears in the record at page 67, it will be found that such instrument is but an *option to purchase*, and is in the form of a letter addressed to the purchaser and begins:

"F. P. Kellogg, Esq., Seattle, Washington:

"Dear Sir: For One Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, we hereby *grant to you the option to* purchase from us at any time during a period of four months from the date hereof our entire property located in Chelan County, Washington, the particular description of which is attached hereto and made a part hereof, upon terms and conditions as follows, to-wit:"

Then follows a complete recital of the terms and conditions upon which the purchaser might buy. Among the conditions being that the purchaser should organize a corporation with the proposed name left in blank, providing for the issuance for that corporation of bonds not to exceed $225,000; that the money from the sale of the bonds should be expended by the payment of $80,000 to the defendant in error, and the balance used in the building of a new mill and the conduct of the business. That $2.00 per thousand of every thousand feet of timber manufactured should be applied to the re-

tiring of these bonds, and that all profit derived from the business, including the sale of logged off land, untimbered land, and timber land exclusive of timber, should be applied solely to the payment of the unpaid purchase price. A number of other conditions being also included. Thus it will be seen that this was but *a four months' option* to the purchaser *for the purchasing* of said property, and is referred to and expressly made a part of the instrument heretofore called to the attention of the court. (Plaintiff's Exhibit 13, Record p. 64.)

Is it not therefore perfectly plain that when this stock was agreed to be set apart "for the benefit of Thomas Winsor for negotiating and effecting a sale of the property" and the language was used "In event of said Kellogg carrying out completely the said *proposed sale*" that it was meant that the option should be exercised, the *sale made* upon the terms and conditions proposed, and that *when the sale was so made* the stock should *become the stock of Thomas Winsor?* Is there any reason for supposing that the parties meant that not only should the option be exercised, and *the "proposed" sale* become an actual completed sale, but all the payments and conditions to be made and carried out *after the sale was completed*, should be guaranteed by the broker? A broker's duties are so well known, and are so limited, that it can hardly be conceived that either of

spectfully urge that the court's construction of the instrument is incorrect. The language used is not that Kellogg will first carry out completely the "proposed sale" *and will also*, after such sale, carry out all the varied terms of the contract of sale, but *only* that he will carry out completely "*the said proposed sale.*"

Among other conditions in the proposed sale or option agreement, (Plaintiff's Exhibit 14), are arrangements for a sliding scale salary for Kellogg, as President of the Lumber Company, increasing from $3000 to $5000 per annum. After three or four years' service at such increasing salary, after the building of the mill and the operation thereof, for that length of time, and after due performance in other respects of the terms of the contract, should Kellogg and the defendant in error have become antagonistic and Kellogg has resigned his position, leaving the improved and valuable property in the hands of the defendant in error, would Winsor have forfeited his stock? It may be said that thsee queries are not important now since those things did not in fact occur; but they *are* important in determining whether it is contemplated by the contract that the broker Thomas Winsor was guaranteeing his purchaser to fulfill in future the conditions of his purchase. Apart from all these reasonings and devoting ourselves solely to the narrow

language that moved the court to sustain the motion for a non-suit, is it possible to sustain the ruling?

The two instruments (Plaintiff's Exhibits 13 and 14) are to be construed together as one instrument, according to the terms of Plaintiff's Exhibit 13, "the same as if the terms of said agreement were here set out in full." In other words, Exhibit No. 13, which provides for setting apart $10,000 of the stock to Thomas Winsor, refers to the "proposed sale" instrument, and provides that his purchaser should carry out the *proposed sale* and no more. Two instruments were being drawn at the same time and of the same date. One of them, Exhibit No. 13, was to be transmitted to a trust company which was to hold these bonds and therein the trust company was being advised of its power of control over the bonds. The other instrument, Exhibit 14, was the *option* to purchase the property. The first was proceeding upon the theory that Kellogg might, or might not, elect to purchase the property and therefore Winsor might, or might not, become entitled to his commission. What more natural than that the provision should be inserted that this commission, this $10,000 worth of stock, should be declared to be due Thomas Winsor for his commission "in the event of Kellogg's carrying out completely the said *proposed sale*"? The word "sale" has a definite and well understood meaning; it is the com-

pleted agreement between the parties; it may be for cash; it may be upon long credit; it may be upon simple or upon very complicated terms, but the one is as much a *sale* as the other. It would be folly to claim that a proposed sale upon complex conditions or long time is any less a sale than one for cash and no conditions. And when one contracts to do something when a "proposed sale" is carried out, he means when the proposed sale becomes an *actual sale*, and not when the purchaser pays the last farthing upon long time notes or actually carries out any of his obligations under the sale itself.

If our contention thus far be conceded by this Court, does it not follow that upon reversal of the judgment this Court should enter an order to the effect that the court below should enter a judgment in favor of the plaintiff in error for the sum of $10,000 together with interest thereon from the date of the conversion by the defendant in error of the $10,000 worth of stock set apart to Thomas Winsor by the agreement of the parties? When this stock, by the agreement (Plaintiff's Exhibits 13 and 14), was set apart for the "benefit of said Thomas Winsor" it was to be his whenever his purchaser, Kellogg, should enter into the proposed agreement for the sale of the property and become the purchaser thereof. And pursuant to the agreement of all the parties this stock was to be placed

in the hands of the Union Trust Company as trustee for all the parties, with the other stock, so that Kellogg might become the purchaser of all the stock, including Winsor's $10,000 worth, at par, plus 6 per cent. annual interest thereon. Whenever Kellogg should pay into the hands of the trustee the amount equaling the value of Winsor's stock, the money should become the property of Winsor in lieu of the stock. This arrangement was in no wise an assertion to the effect that Winsor was not the owner of such stock any more than that it was an assertion *that the defendant in error did not own the balance of the stock. All* the shares so deposited were subject to the same condition. Kellogg must pay for the stock belonging to the defendant in error before he could become the owner thereof; similarly he must pay for the stock of Thomas Winsor in order to become the owner thereof. He did not, in fact, pay for either, and therefore, both the defendant in error and Thomas Winsor remained the owner of the amount of stock which each deposited. Would the defendant in error now concede that the stock deposited for the benefit of said de-defendant in error did not remain *its* property? Most certainly not. Actions speak louder than words. The defendant in error got *its* stock back, has ever since owned and held it, and controls the lumber company, the mill and its output, by virtue of its ownership of that very stock.

While the defendant in error by its answer denies that it ever converted *any stock of Thomas Winsor*, its answer is but a negative pregnant, and by the testimony it was clearly shown that if this *was* Thomas Winsor's stock, then the defendant in error *had* converted it, because after Kellogg had carried out the "proposed sale" and he and the defendant in error had executed a written agreement in accordance with the terms of the proposed option, and the purchaser Kellogg had taken possession of the property, exercised dominion over it as owner; had complied with all the terms of the sale, had organized the corporation (The Kellogg Lumber Company), as agreed upon, had bonded the property as agreed upon, had paid over from the proceeds of such bonds the sum of $80,000 to the defendant in error, and had issued the stock provided for and was ready to deposit the same with the Union Trust Company as trustee for all the parties, including the $10,000 worth of Thomas Winsor, *the defendant in error asked to have itself accepted as trustee* instead of the Union Trust Company, and requested Thomas Winsor to consent that the defendant in error should itself become the custodian, as trustee, of his particular $10,000 worth of stock, and he (Thomas Winsor), in writing, consented, expressly, however, refusing to have any other condition changed. In accordance with such agreement

all the stock including that of Winsor passed into the hands of the defendant in error as trustee for all the parties. Afterward the defendant in error, without the knowledge or consent of Thomas Winsor, in his absence, and I think we may fairly say, with intent to deprive said Winsor of his earned commission which had become merged in this $10,000 worth of stock, made a *new arrangement* with the purchaser Kellogg by the terms of which Kellogg and the defendant in error "rued their contract," and the ownership of the property was placed in the defendant in error upon certain considerations, among others, being that Kellogg should operate the property as the agent and employee of the defendant in error at a handsome salary. After this action Winsor addressed the defendant in error with reference to the condition of his $10,000 worth of stock and was informed by the defendant in error that he, Winsor, had no stock; that the defendant in error owned the stock and was not responsible to Winsor therefor, and would not deliver any such stock to him. Under all authority this was a conversion of the stock. The only question remaining is: What was the value of this stock? It will be observed by the Court, by reference to Plaintiff's Exhibit No. 13, that there are no *number of shares* of stock agreed upon to be set over to Thomas Winsor, but that there should be set over and held "for the

benefit of Thomas Winsor *$10,000 worth* of said certificates". This was a determining of the value of property to be given to Thomas Winsor in lieu of the $10,000 he had earned as his commission for the sale of this property. It was further provided that when Kellogg took up these securities he should pay to Thomas Winsor, or to the defendant in error for the benefit of Winsor, $10,000 in cash plus 6 per cent. interest thereon, which seems to be an actual *fixing by the parties* of the value of said stock. At least it was a determination of the amount to which Winsor was entitled, and had *Kellogg* converted such stock no one would question that having agreed as he did to *buy this stock*, so placed in escrow, *at* $10,000 plus 6 per cent., he could not after conversion have denied its equivalent value; nor can the defendant in error after having procured the possession of this stock and having converted it to its own use, and denied and yet denying the ownership of Winsor, or of the plaintiff in error, his assignor, be heard to say that the value thereof was at the time of the conversion less than the agreed value.

Should the Court, however, disagree with our contention in this respect, yet upon referring to the testimony of Thomas Winsor at Tr. Record p. 105 will find that that testimony, which is entirely unchallenged, and its truth conceded by the motion

for non-suit, shows the value of the property and its encumbrance, and clearly establishes that the property was not only solvent but worth about $600,000.00 over and above all the encumbrances; was a going concern, and the stock perforce must have been worth its face value.

This testimony of Thomas Winsor together with the provisions of Plaintiff's Exhibits 13 and 14 was proof sufficient to justify the jury in finding a verdict in favor of the plaintiff in error for $10,000 and the accumulated interest. And *the jury should have been permitted to pass upon its sufficiency.* It was a question of fact fairly within the cognizance of the jury, and the court in its opinion acknowledges the justice of this contention, except only that the court was persuaded that the instrument (Plaintiff's Exhibit 13) by its terms compelled the plaintiff in error to depend entirely upon reaping the reward of his services by waiting until Kellogg, the purchaser, paid the last farthing of his indebtedness to the vendor. The fact that the vendor and vendee, in the absence of the owner of the $10,000 worth of stock, for considerations sufficient between themselves, secretly changed their agreement of sale and purchase, and the vendor received the property back from the vendee, and the vendee Kellogg gave up his right to purchase the stock, and the trustee holding the stock, being the defendant in error, pro-

ceeded to appropriate the same and to deny the title of Thomas Winsor in the same, was a wrong to the broker, and by such indirection he could be deprived of all interest in the stock or be bereft of his hard-earned commission. It is true that the Honorable Judge of the District Court in his opinion (Tr. Record p. 164) comforts the losing broker and his assignor, the plaintiff in error, in this language:

> "I appreciate the plaintiff has done much service, but the court cannot make contracts."

And again, in its opinion, the Honorable Judge of the District Court, in commenting upon the contention of the defendant in error, that Winsor was not entitled to his commission because the contract for the proposed sale was afterward varied by the vendor and purchaser so as to make a somewhat different plan of control of, and manner of payment for the property, says (Record p. 161):

> "It shows further, and it is conceded that the terms and conditions of that agreement were not carried out. They were abandoned and a new plan was adopted by the parties afterwards. I do not think that that would be material in this case, in view of the fact that the plaintiff in this case got the parties together, and, if the plan which was adopted was substantially the same as the original plans, the plaintiff in this case would be entitled to his compensation if he was the

agency which brought the parties together, and if the parties carried out the agreement which was entered into as understood by the parties."

It had been defendant in error's contention that the new agreement by the parties, here referred to by the Court, had freed them from liability to Winsor. (Tr. R. p. 100, Letter of Mr. Selover to Mr. Winsor.) (Plaintiff in Error's Exhibit 16.)

It is respectfully submitted that the judgment of the court below upon principle and upon authority must be overthrown. See the following:

Bishop vs. Averill, 17 Wash. 209.

Duncan vs. Parker, 81 Wash. 340.

Carstens vs. McReavey, 1 Wash. 359.

It seems to us that the defendant in error having by his motion for non-suit waived the right to introduce any evidence in its behalf, and having by its action submitted the matter in controversy to the court over our objection, that the plaintiff in error was entitled:

1st. To a judgment upon the merits and that that judgment should have been in behalf of the plaintiff in error for the sum of $10,000 and interest.

2nd. That if the plaintiff in error was not entitled to such summary judgment by the *court*, that he was at least entitled to have the cause submitted to the jury upon the evidence thus challenged.

3rd. That in any event he is entitled to have the cause reversed with orders to the District Court to submit to a new jury the evidence taken in the former trial, and to have a verdict upon said testimony.

We, therefore, respectfully submit to the Court our contention as above, and pray for the most favorable relief to which the record entitles the plaintiff in error.

Respectfully submitted,

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No. 2335

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

THOMAS M. SHIELDS,
Plaintiff in Error,

vs.

COLUMBIA RIVER LUMBER COMPANY, A CORPORATION,
Defendant in Error.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief for Defendant in Error.

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STATEMENT OF THE CASE.

In 1911 the defendant in error owned about 50,000 acres of land in Chelan county, Washington, upon a portion of which stood more or less timber. Early in that year, it employed Mr. Charles A. Murray, of Tacoma, to obtain a purchaser therefor, on the basis of $200,000.00 for the property, Murray to receive a commission of 5% (Rec., p. 57).

In connection with Mr. Murray's attempts to find a purchaser, he became connected with Thomas Winsor, the assignor of the plaintiff in error, and at his request Winsor made an examination of the property. An attempt was

made to sell the property to Lambert & Hoban (Rec., p. 50), but this effort failed, and later Mr. Winsor found Mr. F. P. Kellogg as a prospective purchaser.

The record does not clearly show just when the arrangement with Mr. Murray for a $200,000.00 price on a 5% commission was abandoned, but it does show in every subsequent transaction that this particular form of employment was abandoned, and that a $205,000.00 net price was given to, and acted upon by, Mr. Murray and those who worked with him.

The proposition put up to Mr. Kellogg was for a price of $225,000.00, and Mr. Murray had it arranged so that the excess of $20,000.00 over and above the net price to the defendant in error, was to be divided between himself, Mr. Steeves and Mr. Winsor, as follows: Mr. Murray, $5,000.00, Mr. Steeves, $5,000.00 and Mr. Winsor, $10,000.00, and it now appears that at the time in question Mr. Kellogg, the proposed purchaser, had an arrangement with Mr. Winsor whereby one-half of the $10,000.00 to be paid by Kellogg, and which was to go to Winsor, as his share of the profit or commission, was to be turned back by Winsor to Kellogg himself (Rec., pp. 151-52).

The negotiations resulted in the execution of three different papers on the 23rd day of August, 1911.

First, an option agreement between the defendant in error and Kellogg (Rec., pp. 67-71).

Second, a memorandum escrow agreement directed to the Union Trust Company of Chicago, Illinois (Rec., pp. 71-73), and

Third, a memorandum escrow order or agreement in modification of the one last above mentioned (Rec., pp. 64-66).

The *first* document mentioned is an option for four months running to Kellogg, giving him personally the right to buy the entire tract of land in question for the sum of $225,000, paying $80,000 upon delivery of deed, $145,000 on or before five years from date of delivery of deed, $140,000 thereof to be paid to the defendant in error, and $5,000 directly to Charles A. Murray.

It further provides that a deed should be executed and placed in the hands of the Union Trust Company running to Kellogg personally, covering said property, to be delivered to him upon the performance of certain conditions as follows:

1. Kellogg to organize a corporation under the laws of the State of Washington, to which he should transfer the title to the land so to be deeded to him.

2. That corporation to raise money on a bond issue upon the title, and pay $80,000 to the defendant in error through the Trust Company.

3. Kellogg to furnish and deliver through the Trust Company a surety bond guaranteeing the payment of the balance of $145,000 and interest within the five years.

4. Kellogg to further secure said payment by placing in escrow with the Trust Company, the entire Capital Stock of the corporation organized by him.

5. That the corporation was to agree that $2.00 per thousand feet of timber manufactured should be used to retire the bonds, and a further $2.00 per thousand applied toward payment of the unpaid purchase price, together with all other profits upon the operation until the purchase price was paid.

6. Kellogg was to act as manager of the corporation on a salary.

The document *second* above referred to is an escrow order or agreement directing the disposition of the money, $225,000, when paid in by Kellogg to the Trust Company, which escrow was prepared with the idea of depositing the same with the Union Trust Company as soon as Kellogg furnished the surety bond, and thus showed himself to be able to that extent at least to take up the option. Kellogg never furnished that bond (Rec., pp. 150-1). Consequently the escrow agreement was never used or filed with the Union Trust Company; no corporation under the laws of Washington in accordance with this option was ever organized by Kellogg, no deed ever made to Kellogg, and no stock of such a corporation ever came into existence.

The *third* document was another escrow order directed to the Union Trust Company (Rec., p. 64), whereby the documents one and two are referred to as if set forth therein in full, and whereby the Trust Company was to be directed to set aside $15,000 of the certificates of stock in the corporation Kellogg was to organize under the laws of Washington, when the Trust Company should receive the same from Kellogg, for the benefit of Winsor to the extent of $10,000, and Steeves $5,000, and that when the $145,000 and interest should be paid by Kellogg in cash to redeem all said certificates, it was to pay to Winsor $10,000 plus interest, and to Steeves $5,000 plus interest; the other $5,000 of the $20,000 excess over the net price—the difference between $205,000 net to the defendant in error and the price of $225,000 which Kellogg was to pay,—having been already arranged for by the direction to pay $5,000 to Mr. Murray. The original of this document has been transmitted to this court, and the attention of the

court is particularly called to the interlineations in writing of the following phrases:

"In event of said Kellogg's carrying out completely the said proposed sale," and "In manner and form following."

A copy of this paper was given to said Winsor, and the others held awaiting Kellogg's deposit of the $150,000 surety bond; this never having been done, the document was never delivered to the Union Trust Company.

About the 29th of November, 1911, Kellogg having utterly failed to take up the option or put himself in a position to do so, and being wholly unable to give the bond, so notified the defendant in error, and further negotiations resulted in a new option being given to Kellogg on the 29th of November, 1911 (Rec., p. 122). By the terms of this option, a corporation was to be formed under the laws of Nevada, with certain restricted powers, capitalized at $450,000, $150,000 Preferred, $300,000 Common, the land was to be deeded to it by defendant in error, and all of the stock was to be issued to the defendant in error, and to be at all times owned by it, subject to the optional right given Kellogg to purchase the stock.

A bond issue was to be made and $80,000 of the proceeds was to be turned over by the new company to the defendant in error, and the balance expended in improvements upon the property. Upon the completion of the bond issue, one-third of the common stock was to be assigned to Poole & Company for financing the operation.

The defendant in error then granted unto Kellogg "the right and option at any time within five years from Jan. 1st, 1912, to purchase of and from the defendant in error, the $150,000 of Preferred Stock and $200,000 Common Stock of the corporation for the sum of $145,000 and interest." The agreement provided that "upon the full pay-

ment of which sum and interest by said second party (Kellogg) or his heirs or assigns to the said first party in accordance herewith, the said stock shall be assigned by the said first party to the said second party or to his order or estate."

Then follow provisions respecting the handling of the property, Kellogg to be manager and to be paid a salary, details as to what should be done with the proceeds of the manufacturing operation, and then the following (Rec., p. 129):

> "9. This agreement shall not grant the said second party any rights or interests whatsoever in or to any of the said lands above referred to but shall be held and considered to be for no other purpose than to give him an opportunity to purchase the said common stock and preferred stock under the conditions above set forth."

Pursuant to this document, the F. P. Kellogg Lumber Company was formed under the laws of Nevada, capitalized as stated, the lands deeded to it, the bond issue was completed and the stock of the corporation was issued in the name of the defendant in error, the Columbia River Lumber Company, except one qualifying share which was issued in the name of Kellogg so he might become a trustee and officer, and that share was immediately retransferred to the defendant in error (Rec., p. 145).

Some improvements were made, and the money spent, and Kellogg found that he was unable to go any further for lack of a large sum of money.

Kellogg never paid one dollar to the defendant in error upon such option to purchase the stock, and fell down entirely in his attempt to work the matter out.

This resulted in his surrendering his option and stepping out of the company in 1913 (Rec., p. 138).

Kellogg never exercised the option to purchase the stock, never paid anything thereon (Rec., p. 149), and the $80,000 received by the defendant in error was borrowed upon its own property.

On May 7th, 1912, Winsor and Kellogg, without the knowledge of the defendant in error, fixed up Exhibit No. 22 (Rec., p. 141), whereby Winsor consents that certain stock which he claims should have been issued under the agreement of August 23rd, 1911, and delivered to the Union Trust Company, might be delivered to the Columbia River Lumber Company instead, "and in this respect waiving no other or further conditions in said agreements of August 23rd, 1911" (Rec., pp. 64-67-71).

Later Winsor demanded the issuance and delivery of Preferred Stock in the F. P. Kellogg Lumber Company for $10,000 direct to him, which demand resulted in the letter of Nov. 7th, 1912, from Mr. Selover for the defendant in error, Exhibit No. 16 (Rec., pp. 100-103), wherein the position of the defendant in error was made reasonably plain. The Kellogg option of November 29th, 1911, was still in force, and, waiving its technical rights, the defendant in error offered to deposit $20,000 of the Preferred Stock of the Kellogg Company with a trustee with an order and direction to Mr. Kellogg to pay to that trustee the proportion of the unpaid purchase price, which would be credited to that stock, totaling $20,000 in all, and with the direction to the Trust Company that "when Kellogg has in all respects fully carried out his contract with us, and has received and paid for all the Preferred Stock, that then and in that event, the sum of $20,000 shall be paid to you three gentlemen in certain proportions."

Winsor was not satisfied with this, but demanded the stock, which was refused, and he thereupon, in April of

1913, assigned his rights to the plaintiff in error, Exhibit 17 (Rec., p. 107). This action was then commenced for conversion of the stock of the F. P. Kellogg Lumber Company, and resulted in a non-suit and a judgment of dismissal.

ARGUMENT.

I.

WINSOR NEVER EARNED ANY COMMISSION, WHETHER IN STOCK OR OTHERWISE.

II.

WINSOR NEVER BECAME ENTITLED TO HAVE ANY STOCK DELIVERED TO HIM AT ANY TIME, HENCE NO CONVERSION WAS POSSIBLE.

I.

Kellogg claimed to have a high personal responsibility (Rec., p. 53), and under the option of August 23rd, 1911, was to furnish a surety bond to guarantee the payment of $145,000 and interest in case he took up the original option; in addition all the stock was to be deposited with the Union Trust Company as trustee as further security. Under such option, the title to all these lands was to be actually turned over to Kellogg himself by deed; he was to become the owner of it, and was then to turn it over to a corporation of the State of Washington to be formed by him, which corporation was to issue all its stock to Kellogg. He was then to deposit that stock, put up a surety bond to secure his remaining indebtedness of $145,000, after paying the defendant in error $80,000, which he intended to borrow upon what would then be his property.

Such a proposed sale would, if carried out by Kellogg, have been a real sale of the land to a party found and produced by Winsor. The document, Exhibit 13 (p. 64), as drawn and presented by Winsor to the defendant in error, obligated the defendant in error to pay $15,000 as commission. It read (page 65), "The Columbia River Lumber Company have agreed to pay as a commission for perfecting the sale, the sum of $15,000."

This the defendant in error refused to sign, and it was modified so as to make the payment conditional upon actual and complete payment by Kellogg, by inserting after the word "agreed" in the above quotation, the following: "In the event of said Kellogg's carrying out completely the said proposed sale"; and further limited Winsor's right to receive payment by inserting the words "in manner and form following," thus expressly limited his right to receive payment to the time "when the cash shall be paid to redeem said certificates."

The agents, having a net price agreement, were not entitled to anything until the defendant in error actually received something over and above the net price of $205,000. If they sold for $205,000 only, they got nothing. If for $225,000, they would receive $20,000, after and when the same should have been paid. All the arrangements made were based on this situation.

To issue stock and turn it over to Winsor would have given him part of defendant's property for nothing.

However, the option of the 23rd of August was never carried out, no corporation was ever formed pursuant to it, Kellogg could not put up the bond or satisfy the defendant in error as to his responsibility. So the defendant in error, in November of 1911, absolutely refused to go into any transaction such as that involved in the August 23rd

document, or which contemplated turning over to Kellogg or to a corporation owned by him the title to this property without payment or security.

A new option, that of November 29th, was given Kellogg after he had completely fallen down on the first one, whereby for convenience a new corporation was formed, called the F. P. Kellogg Lumber Company, of which all of the stock was held and owned by the defendant in error, even including the one share of stock nominally issued in Kel logg's name; the defendant in error turned over its title to this new corporation, which it owned and the ownership of which it never parted with. Through that corporation it borrowed some money and paid to itself $80,000 thereof.

It gave Kellogg an option to buy all of the stock of the concern, excepting $100,000 par value of common stock, which went to the bankers. It did not give him any option to purchase or own the real estate, but expressly denied such right. It retained possession of all its property and moneys, borrowed and otherwise, through the new corporation, and Kellogg's position was that of a hired man paid a salary for doing his work, with an option to purchase the major part of the stock of the concern.

Kellogg's claim of responsibility had vanished, his $150,000 surety bond was unobtainable, and he certainly was not ready, able and willing to buy anything. The situation was the same as if the defendant in error itself had given Kellogg the option to buy all its outstanding stock; the formation of a new corporation being merely a matter of convenience, gave him no rights, and the transfer to it was not a sale of the property in any sense of the word.

II.

This action is not for a commission, but for the conversion of stock owned by Winsor, to the possession of which he claims to have been entitled in 1912 and 1913.

It seems plain that the stock which was to be deposited with the Union Trust Company was never to become the property of Winsor in any event.

That stock was to be issued by a corporation organized by Kellogg, and was to be issued to, and become the property of Kellogg; he was then to deposit it as additional security with the Trust Company for the payment of the balance of the purchase price, $145,000 and interest. If, and when he should redeem it, the stock should be released to Kellogg and a portion of the money was to go to Winsor. Setting aside by the Trust Company of that much of Kellogg's stock, deposited as collateral, was mere bookkeeping. The stock was not to be in the name of the defendant in error at all; it was to be assigned by Kellogg to the Union Trust Company as security. The defendant in error was, under no circumstances, to receive the stock unless Kellogg defaulted, and his surety bond became worthless, in which event defendant in error might foreclose its lien and become the owner of the stock; in other words, might again become the owner of its own property, without having received a dollar therefor.

Winsor was never to receive stock, but money, and that only in event Kellogg made good.

If it had been intended that Winsor should receive stock, why was it carefully provided that he should receive interest upon the $10,000 from the time the option was taken up until the time the money was paid? Under the Kellogg option, this might be five years, and such interest has no

relation whatever to the ownership of stock. Indeed, the company which issued the stock became the company which was obligated to pay the interest and the obligation to pay interest to Winsor on this very $10,000 was a liability against the stock itself.

If we consider the Preferred Stock in the new corporation, the F. P. Kellogg Lumber Company, to be in the hands of the defendant in error, held for Winsor's benefit under the terms of the August 23rd agreements—and this is the view most favorable to the plaintiff in error—it must be so held under the conditions and limitations to be found in those documents. Indeed, in Winsor's alleged consent to the defendant in error's holding this stock instead of turning it over to the Trust Company, we find (Exhibit 22, page 142), Mr. Winsor says: "And in this respect, *waiving no other or further conditions in said agreements of August 23, 1911.*"

It will be noted that this exhibit is dated May 7th, 1912, long after the agreement of November 29th, 1911, with Kellogg, which the plaintiff in error now urges was in and of itself all that was necessary to entitle him to the delivery to him of the stock in question. Yet in May of 1912, Winsor over his own signature, directly acknowledges that whatever rights he has with respect to the stock of the F. P. Kellogg Lumber Company, in the hands of the defendant in error, depend upon the agreement of the 23rd of August, 1911.

Upon this theory, defendant in error was holding this stock as trustee to await the completion by Kellogg of his contract, the taking up of his option to buy the stock strictly in accordance with the agreement of August 23rd, and particularly of Exhibit 13 (page 64), upon which plaintiff in error stands. A refusal on the part of the

defendant in error to issue and deliver the stock to Winsor was therefore absolutely justified as being in the teeth of the agreement of August 23rd, which plainly states that the stock assigned as collateral, was to be held until it was paid for by Kellogg, and then returned to him, and the money, as such, when received, paid to Winsor. Indeed, that agreement contemplates the receipt by Winsor of *money* and nothing else, and that only upon condition that it be received from Kellogg.

There is not one word in any one of those agreements which shows a willingness on the part of the defendant in error, under any possible state of circumstances, to pay one dollar of its own money to Winsor for doing anything, or that Winsor expected it to do so. He was to have a portion of the purchase money secured by him for the defendant in error from Kellogg when he had secured it, and not before. The stock he never was to get.

Had it been the intention of the parties that he was to have stock, they would have said so, and it would have been wholly unnecessary to place stock in the hands of a trustee if it belonged to Winsor. Winsor has no more right to claim the stock from the possession of the defendant in error, than he would have had, at any time during the five years had the Union Trust arrangement been made use of, to have demanded it from the Union Trust Company. Manifestly that company would have committed a breach of trust had it given out to Winsor upon his demand stock in the Kellogg corporation, issued in Kellogg's name and assigned to it, the Trust Company, as trustee, as collateral to the obligation to the defendant in error to pay $145,000 and interest. That the Trust Company would be held liable for refusing to so breach the contract under which it held the stock, is unthinkable; and the most that can be

said for the contention of the plaintiff in error is that the defendant in error is in the same position that the Union Trust Company would have been had the original deal been carried out.

But the original transaction was abandoned through Kellogg's default, and the rights which Kellogg received under the option of November 29th, 1911, were as nothing compared to those he would have received had he put up the bond and carried out the original agreement. Then he would have become the owner of the property. Now he became the owner of nothing, and had a mere option to purchase some stock. That stock never became Kellogg's, and its ownership left the status of the property just where it was before the transfer was made, to-wit: in the defendant in error. For the defendant in error to be required to turn over the stock to Winsor would be merely to give him a part interest in its own property without receiving the slightest benefit in return. Instead of procuring a sale of the land, at best he procured a man who took one option, and then another, and fell down completely on both.

To say that he would have been entitled to the stock under the original agreement from the Union Trust Company would be stretching the facts and the law too much, but what shall we say of a demand that the defendant in error part with $10,000 of its own stock, which it never in any document had agreed to turn over to anyone except Kellogg? In what document or line is there a word entitling Winsor to the possession and ownership of any preferred stock in the F. P. Kellogg Company, owned by the defendant in error?

The attitude of the defendant in error, as shown by the letter of Mr. Selover of November 7th, 1912 (pages 100-103), was a willingness to waive any technical rights, and

to deposit in some trust company certificates representing this stock "with an order and direction to Mr. Kellogg to pay into that trust company the proportion of the unpaid purchase price which would be credited to that stock, totaling $20,000 in all, with a direction to the Trust Company that when Kellogg has in all respects fully carried out his contract with us, and has received and paid for all the preferred stock, that then and in that event, the sum of $20,000 shall be paid to you three gentlemen in certain proportions. This will give you your money as soon as you become entitled to it, to-wit, as soon as the transaction is completed, and until that time no one knows whether it will be completed or not."

This attitude was strictly in accordance with the escrow papers of August 23rd, 1911, and would have been a proper answer for the Union Trust Company to have made had the demand been made upon it. More than that, it showed a very liberal regard for the rights of Winsor and the others.

Nothing can be clearer upon this point than the conclusion arrived at by the court below (Rec., p. 19):

> "This stock was not to be paid to these parties. If it had been considered that they were entitled to anything at that time, the stock would have been delivered to the parties instead of putting it in the Union Trust Company. But there was still something to follow, and, what was to follow was simply what was interlined there, the carrying out of the proposed sale by the payment of the money, and then the Union Trust Company was authorized to pay to these parties, not the stock, but the money, when it was paid by Kellogg. Now, then, in the memoranda that was made by Winsor on May 7th, 1912, he says he is willing that the Columbia River Lumber Company shall hold the stock instead of the Union Trust Company, and therefore, as the testimony shows here, I conclude that the Columbia River Lumber Company has this

stock, and is still holding it. Mr. Kellogg has stated that he has not paid anything; that he has abandoned the property; that he was short of funds, and needed more funds, and the parties have declined to advance him more funds, and it was concluded that he had better surrender all the property, which he did. He never paid a cent in, and never got a cent out, other than his compensation."

It is respectfully submitted that the judgment of the court below was right, and should be affirmed.

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